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Child Pornography Law

by

Gareth Griffith and Kathryn Simon

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Table 1 Commonwealth Criminal Code Internet and Customs Importation/Exportation offences - Child pornography/child abuse material

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Table 3 Offences relating to use of children for pornographic purposes under State/Territory law

EXECUTIVE SUMMARY

The focus of this paper is specifically defined to relate to child pornography law. The relevant statutory provisions are set out, with reference to NSW and other Australian jurisdictions, and their operation and application analysed by reference to the available statistical data and case law.

The Henson affair: Issues concerning child pornography have been prominent in political and media debates in recent times. One focus of controversy in recent months has been the exhibition of photographs by Bill Henson at one of Sydney's leading art galleries. The upshot to the Henson controversy was that the exhibition opened, with entry by invitation only. No sooner was the matter resolved than further controversy arose over the publication in *Arts Monthly Australia* of pictures of a naked six-year old girl, in an edition of the magazine that explored the Henson controversy. It is reported that the Rudd Government will ask the Australia Council to develop, in consultation with the arts sector and the general community, a set of protocols to cover the representation of children in art. Going a step further, the NSW Community Services Minister Kevin Greene has urged the development of new classification standards in respect to children in art for the purpose of achieving 'greater clarity and consistency'. The NSW Attorney General John Hatzistergos had also written to State and federal Ministers calling for 'the classification system to be strengthened'. In response, the executive director of the National Association for the Visual Arts, Tamara Winikoff, expressed concern, saying 'The reaction has been excessive and ill-considered because there's already a huge amount of protection in place'. [2.1]

High profile cases: Media attention has been drawn to high profile cases involving child pornography, including that of the former NSW deputy Crown prosecutor Patrick Power and former NSW Aboriginal Affairs Minister, Milton Orkopoulos. [2.2]

The Internet and police operations: Referring to the availability of child pornography material on the Internet, AFP Commissioner, Mike Keelty, said in 2004 that 'Canadian estimates place the number of child pornographic websites operating globally at over 100,000, generating around US\$3 billion per annum'. Responding to this challenge, specialist police units have been formed in Australian States and federally to combat online child exploitation. Internationally, in December 2003, the Virtual Global Taskforce was established. Operation Auxin was an Australian police operation conducted in September 2004. It followed the receipt in the previous March of a referral from Operation Falcon, an FBI investigation into online child pornography. Arrests occurred by jurisdiction as follows: Victoria 68; Queensland 57; NSW 28; Western Australia 24; Northern Territory seven; South Australia six; and Tasmania one. In the wake of Operation Auxin, the law on child pornography was amended across Australia, with the introduction of harsher penalties (among other things). As a result of Operation Centurion in June 2008 the following jurisdictional breakdown for arrests was reported: Queensland 40; NSW 23; Victoria 17; South Australia four; ACT three; and one each in Tasmania and Western Australia. [2.3]

Not a victimless crime: The accessibility of child pornography or child abuse images on the Internet raises the question of the relationship between the viewing of such images and actual child abuse off-line by the offender concerned. It is agreed that the very act of accessing child pornography makes the offender a party to child sexual abuse. As the UK

Sentencing Panel observed: ‘Possession of child pornography is not (as some have argued) a victimless offence’. [2.5]

Definitional issues: Definitions of child pornography can vary considerably, both in a legal context from one jurisdiction to another, and between legal and non-legal approaches to the subject. One source of ambiguity is that the legal definition of a ‘child’ varies between and within jurisdictions for various purposes. In Australia, child pornography legislation in some jurisdictions defines ‘child’ as a person under, or who appears to be under 16 (NSW, Queensland, South Australia, and Western Australia), in others as a person under, or who appears to be under 18 years of age (Commonwealth, Tasmania, Victoria, the ACT and the Northern Territory). [3.1.2]

A further complicating factor for any definition of child pornography is the varieties of behaviour depicted. The narrowest definition would cover only depictions of actual children engaged in explicit sexual activity. In Australia, the various legal definitions of child pornography seek to accommodate the broader view of child pornography. For NSW, the relevant definition includes reference to depictions or descriptions of a child ‘engaged in sexual activity’ or ‘in a sexual context’. The NSW definition of child pornography also makes reference to a third category of prohibited material, relating to depictions or descriptions of a child ‘as the victim of torture, cruelty or physical abuse (whether or not in a sexual context)’. [3.1.8]

Typologies: In recognition of the wide range of images that might be classified as child pornography, COPINE (Combating Paedophile Information Networks in Europe) has developed a grading scheme for categories of child pornography material. [4.2] The COPINE 10 level typology has become influential in clinical and in legal circles. A revised typology was formulated by the UK Sentencing Panel in 2002. [4.3] Subsequently, in the guideline judgment of *Oliver* [2002] EWCA Crim 2766, the UK Court of Appeal (Criminal Division) accepted, subject to one revision, the Panel's analysis of increasing seriousness by reference to five different levels of activity: (1) images depicting erotic posing with no sexual activity; (2) sexual activity between children, or solo masturbation by a child; (3) non-penetrative sexual activity between adults and children; (4) penetrative sexual activity between children and adults; and (5) sadism or bestiality. [4.4] Judicial reference has been made in NSW to the COPINE typology, as in *R v Saddler* [2008] NSWDC 48. However, in the same case Berman SC DCJ rejected any suggestion that the NSW courts should go one step further and take note of the sentencing guidelines laid down by the UK Court of Appeal in *Oliver*, saying that ‘sentencing is essentially a local matter’. [4.5]

Legislative framework: There are a number of arms to the regulation of child pornography, which traverses censorship, customs, crimes and broadcasting legislation, some of which is at State or Territory level and some at the federal level. Of these, it is the various crimes statutes and the Commonwealth customs legislation that are the most important legislative instruments in the fight against child pornography. Censorship and broadcasting legislation are also relevant. [5.1 and 5.2] As set out in Table 1, federally prosecutions are undertaken pursuant to s 233BAB of the *Customs Act 1901* (Cth), which contains offences for the importation and exportation of, amongst other things, child pornography and child abuse material in hard copy. [5.4] Also at the Commonwealth level, the prosecution of online offences is undertaken under the *Criminal Code Act 1995*. [5.5]

Relevant State and Territory offences, which are not confined to online offences, are set out in Table 2. [5.6] Set out in Table 3 are the State and Territory offences relating to the use of children for pornographic purposes. [5.8]

Sentencing issues and child pornography case law: Sentencing issues are raised in relation to child pornography offences, notably the adequacy of penalties imposed on offenders. Maximum penalties are amongst the issues to be considered in the NSW Sentencing Council's current review of sexual offences. The statistics indicate that those who commit child pornography offences are overwhelmingly male and the majority of offenders plead guilty. A significant number of child pornography offenders are sentenced in a Local Court, in which case the maximum penalty is lower than if a matter is heard in a District Court. Statistics indicate that the average length of imprisonment for NSW child pornography offences is 12 months. The average length of the sentences for Commonwealth child pornography offences in 2007-2008 is higher than the previous year, which may indicate a trend towards harsher sentences for child pornography offences. [6.7]

Case law: The case law has also raised a number of issues about how child pornography offenders are charged and sentenced when a large number of items are found in their possession. In *R v Saddler* [2008] NSWDC 48, after discussing the nature of child pornography offences, Judge Berman commented on the inadequacy of the maximum penalty for the offence of possession of child pornography under section 91H(3) *Crimes Act 1900* (NSW). Saddler was charged with three counts of possessing child pornography, each relating to a different location where the items of child pornography were found. Judge Berman commented that the three charges covered 'an enormous number of separate items of child pornography'. [7.1]

Advances in technology such as the development of mobile phone cameras have also meant that problems such as 'up-skirting', where the offender takes a picture up the skirt of a female child, have been addressed by the courts. In *Drummond* [2008] NSWLC 10 the surreptitious, 'up-skirt' filming of a 14 year old schoolgirl was found 'in all the circumstances' to constitute child pornography. One question is whether such behaviour should be prosecuted under a new and separate offence, similar to the offence of intimate covert filming, which was introduced into the *New Zealand Crimes Act* (s 216G) in 2006. [4.4 and 7.6]

1. INTRODUCTION

Issues concerning child pornography have been prominent in political and media debates in recent times. Without attempting a full catalogue of events, these issues have been raised in a variety of contexts, much of it connected to the availability of child pornography material on the Internet. More broadly, the portrayal of children in all forms of media is now subject to greater scrutiny and to heightened concern about the potential for the sexualisation of children in the contemporary media environment.¹ This last issue is not dealt with in this briefing paper, the focus of which is narrowly defined to relate to child pornography specifically and, more narrowly still, to child pornography law. The relevant statutory provisions will be set out, with reference to NSW and other Australian jurisdictions, and their operation and application analysed by reference to the available statistical data and case law. The paper begins with an overview of selected issues and developments in the contemporary debate.

2. DEVELOPMENTS

2.1 The Bill Henson affair

One focus of controversy in recent months was the exhibition of photographs by Bill Henson at one of Sydney's leading art galleries. The exhibition reportedly featured photographs of a 'naked 13-year girl'.² The age-old question of art versus pornography was raised in this context, as were broader questions about the appropriate portrayal and use of children for artistic and other purposes, in advertising, modelling and the like. For some, censorship of the arts was the central issue at stake in the Henson controversy. The *Sydney Morning Herald* art critic, John McDonald, commented, 'Any attempt to stigmatise Henson's work as "pornographic" is doomed to end in failure. Where are the victims? What pornographer has his work in the collections of public museums around the world?'³ On the other hand, for Chris Goddard, the director of Child Abuse Research Australia at Monash University and 30 other signatories of an open letter, the main concern was 'the exploitation of children and their inability to give consent'.⁴ For child psychologist Steve Biddulph, one of the signatories to the open letter, 'It wasn't about pornography, or even about paedophilia – it's about children's rights'.⁵

Politically, Henson's work attracted considerable comment and criticism. NSW Premier

¹ Senate Environment, Communications and the Arts Committee, *Sexualisation of children in the contemporary media*, June 2008; E Rush and A La Nauze, *Letting children be children: stopping the sexualisation of children in Australia*, Discussion Paper No 93, The Australia Institute, December 2006.

² M Devine, 'Picture this: society draws the line', *SMH*, 14 June 2008, p 30.

³ J McDonald, 'Snapshot of a small-minded people', *SMH*, 31 May 2008, p 16.

⁴ A Wilson, 'Henson show by invitation only as police return photographs', *The Australian*, 11 June 2008, p 7.

⁵ C Perkin, 'Henson show sparks new row', *The Australian*, 12 June 2008, p 5.

Morris Iemma said that, 'As a father of four I find it offensive and disgusting', while Opposition Leader Barry O'Farrell said that 'Sexualisation of children under the guise of art is totally unacceptable'.⁶ 'Absolutely revolting' was how Prime Minister Kevin Rudd described the Henson exhibition.⁷ On the arts side of the argument, actress Cate Blanchett and NSW Museum of Contemporary Art director Elizabeth Macgregor were among the co-signatories to an open letter urging the Prime Minister to rethink his public comments.⁸

The Henson exhibition was not ultimately the subject of legal proceedings. NSW Police referred the seized photographs to the NSW Director of Public Prosecutions which advised that it did not believe a case could be made out against Henson under section 91G of the *Crimes Act 1900* (Children not to be used for pornographic purposes), and that a case under section 91H (Production, dissemination or possession of child pornography) against either Henson or the art gallery concerned would be difficult to prove. Sticking by his earlier assessment, the NSW Premier commented that in his personal opinion the photographs 'crossed the line and were inappropriate'. He added, 'I can't understand how a parent could allow a child to be photographed in this way'.⁹

In a separate action, the Australian Communications and Media Authority applied to the Classification Board¹⁰ for a decision on reproductions of four of the Henson photographs found on media websites and a fifth image found on a 'Blog' with related text discussing the controversy. In three of the images from the media websites black bars were placed across the photographs to cover the female's breast and/or genital area. The subjects of the images were variously described as 'female' or 'female child'. In all three cases, as well as in the fourth case of an 'out of focus' image of an 'adolescent female's head and upper torso', the Board decided on a 'G' classification. In all four instances, the majority was of the opinion that the 'nudity is very mild in viewing impact and justified by context. The image occurs within a legitimate reportage context and is not sexualised to any degree'. As for the 'Blog', the text and the image of an adolescent, naked female, her genitals obscured but her breasts visible against a dark background, was classified 'PG'. The 'Blog' content was said to create 'a viewing impact that is mild and justified by context', it being added that the context was 'not sexualised to any degree'.

The upshot to the Henson controversy was that the exhibition opened, with entry by

⁶ C Masters and J Vallejo, 'Who would call this art?', *The Daily Telegraph*, 23 May 2008, p 4.

⁷ D Marr, 'Henson photo not porn, says censor', *SMH*, 6 June 2008, p 3. For further high profile quotes on the Henson issue see – F Walker and H Gilmore, 'Threat to burn art gallery as Henson anger turns vicious', *The Sun-Herald*, 25 May 2008, p 8.

⁸ C Perkin and L Wilson, 'Cate calls on PM to soften art remarks', *The Australian*, 28 May 2008, p 3.

⁹ C Perkin and M Pelly, 'Henson fight will rage on despite the law', *The Australian*, 7 June 2008, p 3.

¹⁰ As explained in a later section of this paper, the application was made pursuant to Schedule 7 of the *Broadcasting Services Act 1992* (Cth).

invitation only.¹¹ No sooner was the matter resolved than further controversy arose over the publication in *Arts Monthly Australia* of pictures of a naked six-year old girl, in an edition of the magazine that explored the Bill Henson controversy. Reproducing a photograph taken by the girl's mother, Polixeni Papapetrou, the cover image showed the girl in front of a painted backdrop that refers to the work of Lewis Carroll. The *Sydney Morning Herald* reported:

In the latest row over the depiction of nude children, Morris Iemma and the State Opposition Leader, Barry O'Farrell, are so offended by the nude pictures of a young girl they want the magazine that published them stripped of federal funding. Kevin Rudd said he could not stand them.¹²

The Premier was quoted as saying 'Let's be clear... This is an issue of child protection. As a community we have a responsibility to protect the innocence of children, and that protection of children should be the only consideration in this matter'.¹³ Subsequently, it was reported that the NSW Government had applied to the Classification Board to determine whether or not the July 2008 issue of *Arts Monthly Australia* should be classified as an unrestricted, restricted or refused publication.¹⁴ On an application from the Australian Communications and Media Authority, the Board classified the home page of *Art Monthly's* website, which contained the cover page to the July 2008 issue of the magazine. The Board decided that the website warranted an unrestricted 'PG' classification.¹⁵

In a further development, *The Australian* reported that the Rudd Government will ask the Australia Council to develop, in consultation with the arts sector and the general community, a set of protocols to cover the representation of children in art.¹⁶ Going a step further, at a meeting of his State and federal counterparts in Canberra, the NSW Community Services Minister Kevin Greene urged the development of new classification standards in respect to children in art for the purpose of achieving 'greater clarity and consistency'. Mr Greene said it was important to continue public debate about 'what is acceptable' in art, and 'the inappropriate use of images of children'. The same report noted that the NSW Attorney General John Hatzistergos had also written to State and federal Ministers calling for 'the classification system to be strengthened'.¹⁷ In response, the

¹¹ D Marr and J Tovey, 'No prosecution, but campaign goes on', *SMH*, 7 June 2008, p 1.

¹² E Jensen, 'New row over nude child pictures', *SMH*, 7 July 2008, p 3.

¹³ R Higson, 'Guidelines plan in nude child row', *The Australian*, 7 July 2008, p 3.

¹⁴ J Hilderbrand, 'Censor to check art mag', *The Daily Telegraph*, 10 July 2008, p 5.

¹⁵ A Wilson, 'Push for review of child art classifications', *The Australian*, 24 July 2008, p 7. In the Board's majority view 'the combination of the child's (partially obscured) nudity and the textual references to debate over art versus pornography is mild in impact'. A minority opinion found the content 'moderate in impact' and would have classified the material 'M'. In a further minority opinion the content consisted of an 'exploitative and offensive depiction of a child' and should be Refused Classification. Note that the content was classified as a film.

¹⁶ Higson, n 13.

¹⁷ Wilson, n 15.

executive director of the National Association for the Visual Arts, Tamara Winikoff, expressed concern, saying 'The reaction has been excessive and ill-considered because there's already a huge amount of protection in place'.¹⁸

2.2 High profile cases

Media attention has been drawn to high profile cases involving child pornography, including that of the former NSW deputy Crown prosecutor Patrick Power who was convicted in May 2007 for downloading more than five hours of explicit Internet material, for which he served six months of a 15-month sentence in Long Bay jail.¹⁹ His term of imprisonment was spent in 'complete isolation' in a special protection unit, away from those inmates Power had helped to place behind bars by his work as a prosecutor.

A further high profile case is that of former NSW Aboriginal Affairs Minister, Milton Orkopoulos, who in May 2008 was sentenced to a minimum of nine years imprisonment for child sex and drug offences. He had pleaded guilty to two charges of possession of child pornography.²⁰

In July 2008 it was reported that the 23-year old son of federal Labor MP Janelle Saffin was charged with three counts of possessing child pornography.²¹

2.3 The Internet, child pornography and police operations

Much has been said and written about the availability of child pornography material on the Internet. Speaking in 2004, Australian Federal Police Commissioner, Mike Keelty, said that 'Canadian estimates place the number of child pornographic websites operating globally at over 100,000, generating around US\$3 billion per annum'.²² As of May 2006, Interpol had assisted in identifying and rescuing 426 victims of online child pornography from the 475,899 images it had collected in its database.²³ In 2007, the British-based Internet Watch

¹⁸ J Tovey, 'Child art needs taste test: minister', *SMH*, 24 July 2008, p 3.

¹⁹ L Kennedy, 'Prosecutor caught with child porn walks out of jail', *SMH*, 19 January 2008, p 6; I Salusinszky, 'Child-porn lawyer freed from prison', *The Australian*, 19 January 2008, p 7. This case is discussed in more detail in a later section of this paper.

²⁰ N Keene, 'MP had kiddie porn, drugs', *The Daily Telegraph*, 20 February 2008, p 7; T Ong, 'Ructions for lemma as Orkopoulos jailed', *The Australian Financial Review*, 22 May 2008, p 13.

²¹ 'MP's son charged over child pornography', *ABC News*, 25 July 2008 - <http://www.abc.net.au/news/stories/2008/07/25/2314041.htm> 'MP's son on child pornography charge', *SMH*, 25 July 2008 - <http://www.smh.com.au/news/national/mps-son-on-child-porn-charge/2008/07/25/1216492692697.html>

²² M Keelty, 'The dark side of technology', *Paper presented at the Crime in Australia, International Connections conference*, Melbourne, 29-30 November 2004 - <http://www.aic.gov.au/conferences/2004/keelty.pdf>

²³ US House of Representatives, A Staff Report prepared for the use of the Committee on Energy and Commerce, *Sexual Exploitation of Children over the Internet*, January 2007, p

Foundation reported that child pornography on the Internet is becoming more brutal and graphic, and the number of images depicting violent abuse has risen fourfold since 2003.²⁴

Responding to this challenge, specialist police units have been formed in Australia to combat online child exploitation. In 1999, for example, NSW police set up the Child Exploitation Internet Unit within the State Crime Command Child Protection and Sex Crimes Squad. This specialist unit investigates 'child sexual abuse and exploitation of children that is facilitated through the use of the Internet, related computer and telecommunication devices'. In March 2005, the Australian Federal Police (AFP) established the Online Child Sex Exploitation Team (OCSET), which performs an investigative and coordination role for multi-jurisdictional and international online child sex exploitation cases. Further, the Australian High Tech Crime Centre (AHTCC) was established in July 2003. It is hosted in Canberra by the AFP and is staffed by members of the AFP and State and Territory police, as well as representatives from private industry and government departments. The Centre's main role is to 'provide a nationally coordinated approach to combating serious, complex and multi jurisdictional technology enabled crimes, especially those beyond the capability of single jurisdictions'.²⁵

Internationally, in December 2003, the Virtual Global Taskforce was established.²⁶ It is made up of law enforcement agencies from around the world (including the Australian High Tech Crime Centre) that are working together to fight online child abuse. One manifestation of this international operational approach was Operation Pin, an initiative of the Virtual Global Taskforce. Announced on 18 December 2003, the operation is said to involve the creation and operation of a number of websites (so-called "honeypots") purporting to offer illegal images. As explained by Krone:

As browsers click through screens warning of the explicit nature of the content, they come to a screen that announces that their attempt to obtain child pornography has been tracked and will be reported to local police. The purpose of this operation is not simply to capture those who might come to this particular site but to undermine the presumed anonymity of the Internet.²⁷

In terms of the scale of the problem, a 2005 Queensland Parliamentary Library briefing paper commented:

The escalation of child pornography on the Internet is emphasised by the fact that law enforcement agencies seized around 12,000 child pornography items between

10 - http://republicans.energycommerce.house.gov/108/News/01032007_Report.pdf

²⁴ 'Child pornography', Wikipedia - http://en.wikipedia.org/wiki/Child_pornography

²⁵ G Griffith and L Roth, *Protecting children from online sexual predators*, NSW Parliamentary Library Briefing Paper No 10, 2007, p 65.

²⁶ Virtual Global Taskforce - http://www.virtualglobaltaskforce.com/what_we_do.asp

²⁷ T Krone, *International police operations against online child pornography*, Australian Institute of Criminology Trends and Issues in Criminal Justice No 296, April 2005, p 5.

1989 and 1994 whereas the recent Operation Auxin uncovered approximately 2 million pornographic images involving children.²⁸

Operation Auxin was an Australian police operation conducted in September 2004. It followed the receipt in the previous March by the AHTCC of a referral from Operation Falcon, an FBI investigation into online child pornography. Using their credit cards, suspects had purchased child pornography online from Belarusian crime syndicates, the credit card payments having been processed by a company in Fort Lauderdale, Florida. The AHTCC followed up the referral of 1,700 credit-card transactions and determined that 708 Australians could be identified. Federal and state police agreed that a national day of action was necessary to prevent offenders being tipped off, and aimed to execute as many search warrants as possible at the same time. Police executed more than 400 search warrants and made over 150 arrests in the first weeks.²⁹ According to the *Sydney Morning Herald*, the arrests occurred by jurisdiction as follows: Victoria 68; Queensland 57; NSW 28; Western Australia 24; Northern Territory seven; South Australia six; and Tasmania one.³⁰ It is reported that those arrested came from diverse professions including police officers, military personnel, lawyers, religious ministers, doctors, nurses and other professionals. In the wake of Operation Auxin, the law on child pornography was amended across Australia, with the introduction of harsher penalties and, in NSW and the Northern Territory, the removal of the requirement for child pornography material to be classified as such by the Classification Board. Federally, a new law was introduced prohibiting the use of a telecommunications service to access child pornography material.³¹

More recently, as a result of Operation Centurion, in June 2008 Australian Federal Police Commissioner Mick Keelty announced that one million child exploitation images were seized by federal and State police forces in coordinated raids around the country. The *Sydney Morning Herald* reported the following jurisdictional breakdown for these arrests: Queensland 40; NSW 23; Victoria 17; South Australia four; ACT three; and one each in Tasmania and Western Australia.³² It is reported that a 'policeman, four teachers and a sports administrator were among those arrested or summoned as a result of the six-month operation'.³³ Some of those arrested therefore were able to access children through their

²⁸ N Dixon, *Strengthening child pornography law: the Criminal Code (Child Pornography and Abuse) Amendment Bill 2004 (Qld)*, Queensland Parliamentary Library, Research Brief No 4/2005, p 1.

²⁹ T Krone, 'Operation Auxin: the Australian response to online child pornography' (2005) 67(3) *Gazette* 30.

³⁰ 'Operation Auxin explained', *SMH* - <http://www.smh.com.au/media/2004/09/30/1096527872004.html>

³¹ Krone, n 29, p 31. These legislative developments are discussed in later sections of this paper.

³² T Allard, 'Child sex abuse: Operation Centurion's shocking fact-file', *SMH*, 5 June 2008 at <http://www.smh.com.au/articles/2008/06/05/1212258967845.html>

³³ K Davis and K Christian, 'Tip of the iceberg', *The Daily Telegraph*, 6 June 2008, p 11.

occupations, while others had previous histories of sex offences.³⁴ Operation Centurion was triggered after a legitimate European website was hacked into and 99 degrading images were placed on it. It is claimed that, 'In the 76 hours that the images were on the website, it received an extraordinary 12 million hits from almost 150,000 computers from 170 countries, including more than 2,800 from Australia.'³⁵ While the investigation and arrests are set to continue, it is said that 'one challenge for police may be whether courts accept entreaties from the accused that they were merely being curious or had stumbled across the images by accident'.³⁶

2.4 Sentencing issues

Sentencing issues are raised in relation to child pornography offences, notably the adequacy of penalties imposed on offenders. By way of example, questions were asked about the leniency of the sentence imposed on the first person charged and convicted as a result of Operation Centurion. Under the headline 'Outrage at light kid-porn sentence' *The Australian* reported that 'The first man sentenced as part of Australia's largest online child pornography sting will be free in 12 months despite being previously jailed for child sex offences, raising fresh concerns about lenient child porn sentences'.³⁷ By reference to NSW Bureau of Crime and Statistics Research figures for 2005, the *Daily Telegraph* reported in April last year that the majority of offenders sentenced for possession of child pornography were given suspended sentences, community service orders or good behavior bonds.³⁸ Only four of the fourteen people convicted for possessing child pornography, where this was the principal offence, received full time jail sentences.³⁹ Understandably, a number of sentencing judges have expressed concern about having to view child pornography material, while at the same time it is claimed that some police officers, concerned about the perceived leniency of sentencing, submit the most detailed and graphic depictions to the courts.⁴⁰

An example of a tougher sentencing outcome is the recent NSW District Court case of 'a woman jailed for at least nine years for forcing her daughters aged six and nine to perform sex acts on each other, photographing them and emailing the pictures to an American man she met over the Internet'.⁴¹ The point to make is that, depending on such factors as the

³⁴ T Allard and T Dick, 'Worldwide web of exploitation', *SMH*, 6 June 2008, p 1. One example included a teacher who had allegedly superimposed images of his students onto existing child abuse photos, placing his face onto the faces of the perpetrators of the acts.

³⁵ T Allard, 32.

³⁶ T Allard, 'Child porn web broken by 70 arrests', *SMH*, 5 June 2008, p 1.

³⁷ A Klan and M McKenna, 'Outrage at light kid-porn sentence', *The Australian*, 27 June 2008 - <http://www.theaustralian.news.com.au/story/0,25197,23929477-601,00.html>

³⁸ 'Most beat jail over child porn', *The Daily Telegraph*, 30 April 2007, p 17.

³⁹ 'Most beat jail over child porn', n 38.

⁴⁰ A Klan & M McKenna, n 37.

⁴¹ J Baker, 'Mother forced child sex acts for man online', *SMH*, 5 April 2008, p 5.

nature of the child abuse material involved and the extent of the offender's involvement with the material, child pornography offences can be dealt with very differently by the courts. In the last case of a woman jailed for at least nine years, actual sexual activity between children was depicted and the offender, who as their mother was in a position of trust towards her children, had produced the material concerned. The fact is that child pornography images are varied in nature, as are the details of cases involving the accessing, possession, production or dissemination of such material. In the UK recently a man who acted as a 'librarian' for a global internet child abuse ring that reached across 33 countries, including Australia, was declared a 'significant risk' to the public and given an indeterminate prison sentence. He had collected nearly 250,000 indecent pictures of children, more than 3,000 of which were in the worst category of child abuse images.⁴²

In a NSW context, Judge Berman's comments about the inadequacy of pornography laws in the *Saddler*⁴³ case are discussed in the later section of this paper on case law. In October 2007, the Attorney General requested that the NSW Sentencing Council review the penalties for sexual offences, including child pornography.⁴⁴

2.5 Child pornography and child abuse

The accessibility of child pornography or child abuse images on the Internet raises the question of the relationship between the viewing of such images and actual child abuse off-line by the offender concerned. In the literature this is referred to as the relationship between fantasy, pornography and behavior. On this issue, Quayle and others argued in *Only Pictures? Therapeutic Work with Internet Sex Offenders* that 'the most reasonable assumption is that pornography may influence, but not cause, the development of sexual offending in some men'.⁴⁵ However, they go on to say that

Regardless of the relationship between individual offending and access to abuse images, the production of such images necessarily requires the sexual abuse of a child, and the demand for more images fuels more production, and therefore more abuse.

In other words, the very act of accessing child pornography makes the offender a party to child sexual abuse. As the UK Sentencing Panel observed:

⁴² L Glendinning, 'Internet paedophile "librarian" give indefinite jail term', *The Guardian*, 18 August 2008 - <http://www.guardian.co.uk/uk/2008/aug/18/ukcrime.childprotection>

⁴³ *R v Saddler* [2008] NSWDC 48.

⁴⁴ The Sentencing Council of NSW, *Media Release*, October 2007 at - http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_news

⁴⁵ E Quayle, M Erooga, L Wright, M Taylor and D Harbinson, *Only Pictures? Therapeutic Work with Internet Sex Offenders*, Russell House Publishing 2006, p 65. In the Second Reading speech for the *Crimes Amendment (Child Pornography) Bill 2004* the Attorney General Bob Debus commented that child pornography is used, among other things 'to "reinforce cognitive distortions" (by rationalising paedophilia as a normal sexual preference)' and 'to fuel their sexual fantasies' - *NSWPD*, 11 November 2004, p 12738.

Possession of child pornography is not (as some have argued) a victimless offence. Every indecent photograph or pseudo-photograph of a child is, with limited exceptions, an image of a child being abused or exploited. Easy access to the Internet, and other developments in computer technology, have undoubtedly made these offences more prevalent. No-one knows exactly how many offences are committed, although it is clear that those that come to court are only the tip of the iceberg.⁴⁶

3. DEFINING CHILD PORNOGRAPHY

3.1 Definitional issues

Definitions of child pornography can vary considerably, both in a legal context from one jurisdiction to another, and between legal and non-legal approaches to the subject. Indeed, some commentators would avoid using the term child pornography altogether, adopting it only because it has wide currency and remains the conventionally acceptable term.⁴⁷ Under the Queensland *Criminal Code Act 1899* the preferred statutory term is ‘child exploitation material’ (s 207A), as it is under s 1A of the Tasmanian *Criminal Code Act 1924*; under the Northern Territory’s *Criminal Code* (s 125B) it is ‘child abuse material’.

On the issue of definition it is said that:

The question of what constitutes child pornography is extraordinarily complex. Standards that are applied in each society or country are highly subjective and are contingent upon differing moral, cultural, sexual, social, and religious beliefs that do not readily translate into law. Even if we confine ourselves to a legal definition of child pornography, the concept is elusive. Legal definitions of both ‘child’ and ‘child pornography’ differ globally and may differ even among legal jurisdictions within the same country.⁴⁸

A similar point was made by Grant, David and Grabosky, stating:

Public discourse on child pornography is afflicted by extreme definitional ambiguity. Precisely what child pornography is, and what it is not, may not be explicitly defined in a given jurisdiction. Moreover, definitional boundaries may expand or contract over time, depending upon evolving social and political values.

⁴⁶ UK Sentencing Panel, *The Panel’s advice to the Court of Appeal on offences involving child pornography* - http://www.sentencing-guidelines.gov.uk/docs/advice_child_porn.pdf

⁴⁷ M Taylor and E Quayle, *Child Pornography: an Internet crime*, Brunner-Routledge 2003, p 7. A better term in their view would be ‘images of sexual abuse’, or more simple ‘abuse images’.

⁴⁸ M Healy, *Child pornography: an international perspective*, Prepared as a working document for the First World Congress Against Commercial Sexual Exploitation of Children, 1996 - http://www.csecworldcongress.org/PDF/en/Stockholm/Background_reading/Theme_papers/Theme_paper_Pornography_1996_EN.pdf

And they can vary significantly across jurisdictions.⁴⁹

3.1.1 Cultural factors: O'Donnell and Milner comment on the cultural factors that can influence the definition of child pornography. They note, for example, that when laws were introduced in Japan in 1999 to combat child pornography, exclusion was provided for *manga* comic books, which often involve depictions of graphic sex and violence. Moreover, it seems 'the individual's right to possess child pornography and distribute it, recreationally, online' was preserved in Japan. O'Donnell and Milner also note that Article 240B of the Dutch Penal Code protects from prosecution those in possession of child pornography for 'scientific, educational or therapeutic purposes'.⁵⁰

3.1.2 Child: One source of ambiguity is that the legal definition of a 'child' varies between and within jurisdictions for various purposes. By Article 34 of the United Nations Convention on the Rights of the Child, to which Australia is a signatory, states undertake to protect children from all forms of sexual exploitation and sexual abuse. Specifically, they agree to take all appropriate national, bilateral and multilateral measures to prevent 'the exploitative use of children in pornographic performances and materials'. By Article 1 of the Convention, a child is defined as a 'human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

In Australia, child pornography legislation in some jurisdictions defines 'child' as a person under, or who appears to be under 16 (NSW, Queensland, South Australia, and Western Australia), in others as a person under, or who appears to be under 18 years of age (Commonwealth, Tasmania, Victoria, the ACT and the Northern Territory). Variations also apply within jurisdictions. In NSW the age of consent generally is 16.⁵¹ However, for the purposes of child prostitution law and for the provision prohibiting the use of children for pornographic purposes (s 91G of the NSW *Crimes Act 1900*) a 'child' is defined as a person 'who is under the age of 18 years'.

3.1.3 Visual depictions and written descriptions: Variations also apply in respect to definitions of the content or nature of the material prohibited as child pornography. O'Donnell and Milner comment that while some jurisdictions 'seek to cover every type of visual and audio representation, others exclude paintings and drawings, and some exclude texts'.⁵² For example, both the European Union's Framework Decision on combating the sexual exploitation of children and child pornography, which entered into force in January 2004, and the definition arising from the Council of Europe's Cybercrime Convention 2001

⁴⁹ A Grant, F David and P Grabosky, 'Child pornography in the digital age' (1997) 3 (4) *Transnational Organised Crime* 171-188 - <http://www.aic.gov.au/publications/chpornography/> - 2

⁵⁰ I O'Donnell and C Milner, *Child pornography: crime, computers and society*, Willan Publishing 2007, pp 66-67.

⁵¹ Certain variations also apply within jurisdictions. For example, in NSW it is an offence to engage in or to attempt to engage in sexual intercourse with a person under the age of 18 if that person is under the care of the offender - *Crimes Act 1900* (NSW), s 73 (NSW).

⁵² O'Donnell and Milner, n 50, p 65.

refer only to visual depictions and representations. Written materials were deliberately left out of the EU definition, as there was no support or agreement for the inclusion of textual or written material in the definition of child pornography. On the other hand a more inclusive approach was adopted in article 2(c) of the United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which came into force on 18 January 2002, which defines child pornography as

any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.⁵³

Under s 91H of the NSW *Crimes Act*, child pornography is defined to include reference to depictions or descriptions of a child. Reference to ‘descriptions’ in this context is an express recognition that child pornography comes not only in the form of images but also as text. The same applies in all other Australian jurisdictions, although the ACT follows the UN Optional Protocol in referring to ‘anything that represents’.

3.1.4 Persons who appear to be a child: A major issue in the prosecution of child pornography offences is that it will often be impossible to prove the actual age of the subject or victim concerned. For this reason, many definitions refer to a person who ‘appears’ to be under a certain age. Both the EU and the Council of Europe definitions refer to ‘a person appearing to be a minor engaged in sexually explicit conduct’. With the possible exception of the ACT, in all Australian jurisdictions definitions of child pornography include persons who appear to be under 16 or 18 years, or in the case of Western Australia persons who ‘look like’ a child under 16.

3.1.5 Virtual child pornography: A further issue is whether definitions of child pornography include computer generated images. According to O’Donnell and Milner, in Ireland, England and Wales no distinction is made in law between computer-generated images and actual child pornography pictures. The same observation applies broadly to Australian definitions of child pornography material.⁵⁴ O’Donnell and Milner say that this situation can be compared with other jurisdictions where the status of computer-generated images is ambiguous, and with the United States where ‘they enjoy the protection of the First Amendment as no harm was involved in their production’.⁵⁵ This follows the decision in *Ashcroft v Free Speech Coalition*⁵⁶ where a provision of the Child Pornography and

⁵³ Ratified by Australia 8 January 2007. This discussion draws on – Y Akdeniz, *Internet child pornography and the law: national and international responses*, Ashgate 2008, pp 9-11.

⁵⁴ ‘Material’ is defined broadly for this purpose, as for example under s 91C of the NSW *Crimes Act 1900*. When the South Australian law was revised in 2004, the Second Reading speech said the relevant definition was expanded to include ‘morphed’ images – *SAPD (House of Assembly)*, 26 October 2004, p 562.

⁵⁵ O’Donnell and C Milner, n 50, p 65.

⁵⁶ 535 US 234 (2002)

Protection Act 1996⁵⁷ extended the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced using adults who look like minors or by using computer imaging (virtual child pornography). Basically, the provision did not satisfy the ‘harm’ test established in *New York v. Ferber*,⁵⁸ which established the State’s interest in protecting the children exploited in the production of child pornography.⁵⁹ However, even after the decision in *Ashcroft*, areas of ambiguity remain for US law, in particular in relation to ‘morphed’ images ‘where pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity’. The specific provision was not challenged in *Ashcroft* where US Supreme Court commented, ‘Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*’. In the UK on the other hand such morphed images are captured by the use of the term ‘pseudo-photograph’ in both the *Protection of Children Act 1978* and the *Criminal Justice Act 1988*.⁶⁰

The general point to make is that complexities and anomalies arise, largely as a result of technological advances, which make the nature of prohibited material harder to define.

3.1.6 Tests: Deciding whether certain material constitutes child pornography will depend on the legal test that is to be applied and the court’s interpretation of that test in any instance. As noted, in the US a ‘harm’ test applies, by which material which does not depict harm to an actual child will be excluded from the reach of child pornography law. In Australia, on the other hand, following the ‘community standards’ test applied by Windeyer J in *Crowe v Graham*,⁶¹ the identification of harm is not an essential or defining indicia of child pornography. Rather, the test is whether the material at issue is, in all the circumstances, offensive to reasonable adults, this being a question of fact to be decided by the relevant Tribunal. Obviously, material depicting harm to a child is more likely to be considered offensive, but that is not to say that offensiveness is restricted to material of this type. The offensiveness test may apply irrespective of whether actual harm can be demonstrated to have been inflicted on an actual child. Where harm does become a more crucial element in this scheme of things is at the sentencing stage, where material depicting harm will be treated more severely by the courts, as an aggravating factor in the offence.

⁵⁷ 18 USC § 2251. The constitutionality of the replacement legislation, The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act 2003, was upheld in *United States v Williams*, Docket No. 06-694 (19 May 2008). Under the Act, the visual images must involve actual children.

⁵⁸ 458 U.S. 747 (1982).

⁵⁹ As a general rule, in the US pornography can be banned only if obscene under the definition set forth in *Miller v. California*, 413 U.S. 15 (1973). But under the ‘harm’ test in *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene.

⁶⁰ AA Gillespie, ‘Sentences for offences involving child pornography’, February 2003, *Criminal Law Review* 81.

⁶¹ (1969) 121 CLR 375.

The same applies in the UK, where the relevant test is that of ‘indecent’, but where harm will be a critical factor in the sentencing decision.

3.1.7 The defence of artistic purpose: In deciding whether material does and does not constitute child pornography regard will be had to the defences available in different jurisdictions. Anticipating the discussion in a later section of this paper, s 91H of the NSW *Crimes Act 1900* includes a defence for where the defendant was acting, among other things, ‘for a genuine...artistic...purpose’. This raises the whole issue of the distinction between art and pornography in this context, as highlighted by the recent controversy over Bill Henson’s work.

3.1.8 Types of behaviour: A further complicating factor for any definition of child pornography is the varieties of behaviour depicted. The narrowest definition would cover only depictions of actual children engaged in explicit sexual activity. But as Grant, David and Grabosky comment, one can ‘imagine suggestive depictions of children entailing other than sexually explicit behaviour’.⁶² By way of example, the definition adopted by the Council of Europe’s Cybercrime Convention 2001 refers exclusively to ‘sexually explicit conduct’, whereas the EU’s Framework Decision adds to this the ‘lascivious exhibition of the genitals or the pubic area of a child’.⁶³

In Australia, the various legal definitions of child pornography seek to accommodate the broader view of child pornography. For NSW, the relevant definition includes reference to depictions or descriptions of a child ‘engaged in sexual activity’ or ‘in a sexual context’. The NSW definition of child pornography also makes reference to a third category of prohibited material, relating to depictions or descriptions of a child ‘as the victim of torture, cruelty or physical abuse (whether or not in a sexual context)’. This approach raises the question whether child pornography extends beyond the sexual context to include all forms of child abuse material. Note that the Commonwealth Criminal Code, which defines child pornography broadly and in considerable detail, includes separate offences relating to ‘child pornography material’ and ‘child abuse material’.

In summary, agreeing that child pornography material is offensive to a high degree is easy enough. On the other hand, defining child pornography, legally or otherwise, is anything but straightforward.

⁶² Grant, David and Grabosky, n 49.

⁶³ Akdeniz, n 53, p 10.

4. TYPOLOGIES

4.1 Types of online child pornography offenders

Various typologies operate in respect to child pornography, one of which is Krone's typology of online child pornography offenders. Presented is an increasing seriousness of offending, from offences that do not directly involve a child, to offences that involve direct contact with children, and from online grooming to physical abuse. Nine categories of offenders are set out by Krone as follows:

Typology of online child pornography offending

Browser	May come across child pornography unintentionally, through spam for example, but then decide to keep it
Private fantasy	Conscious creation of online text or digital images for private use
Trawler	Actively seeking child pornography using openly available browsers
Non-secure collector	Actively seeking material often through peer-to-peer networks
Secure collector	Actively seeking material but only through secure networks, which may require interested parties to submit child pornography images as entry barrier to network
Groomer	Cultivating an online relationship with one or more children. The offender may or may not seek material in any of the above ways. Pornography may be used to facilitate abuse
Physical abuser	Abusing a child who may have been introduced to the offender online. Child pornography is used to supplement offender's sexual craving. The physical abuse may be recorded for the personal use of the abuser but is not intended to be further distributed
Producer	Records own abuse of children or that of others, or induces children to submit images of themselves. Images of abuse provided to other users of child pornography
Distributor	May or may not have a sexual interest in child pornography. His sole motive may be financial gain

Source: T Krone, *A Typology of online child pornography offending*, AIC Trends and Issues in Crime and Criminal Justice No 279, July 2004

4.2 COPINE typology of child pornography material

The COPINE (Combating Paedophile Information Networks in Europe) Project was founded in 1997, and is based in the Department of Applied Psychology, University College Cork, Ireland. The COPINE Project is described as a unique academic initiative, applying Forensic and Clinical Psychology to the analysis of vulnerabilities for children related to the Internet. The initial focus of the Project related to sexual exploitation of children through the Internet, which finds expression in child pornography.⁶⁴ In support of this work, and in recognition of the wide range of images that might be classified as child pornography, COPINE has developed a grading scheme for categories of child pornography material, as follows.

⁶⁴

COPINE Project Background - <http://www.copine.ie/background.php>

COPINE typology of material used by persons with a sexual interest in children

Level	Name	Description of picture qualities
1	Indicative	Non-erotic and non-sexualised pictures showing children in their underwear, swimming costumes, etc, from either commercial sources or family albums; pictures of children playing in normal settings, in which the context or organization of pictures by the collector indicates inappropriateness
2	Nudist	Pictures of naked or semi-naked children in appropriate nudist settings, and from legitimate sources
3	Erotica	Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness
4	Posing	Deliberately posed pictures of children fully, or partially clothed or naked (where the amount, context and organization suggest sexual interest)
5	Erotic posing	Deliberately posed pictures of fully or partially clothed or naked children in sexualized or provocative poses
6	Explicit erotic posing	Emphasising genital areas where the child is either naked, partially or fully clothed
7	Explicit sexual activity	Involves touching, mutual and self-masturbation, oral sex and intercourse by child, not involving an adult
8	Assault	Pictures of children being subject to a sexual assault, involving digital touching, involving an adult
9	Gross assault	Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation or oral sex involving an adult
10	Sadistic/Bestiality	Pictures showing a child being tied, bound, beaten, whipped or otherwise subject to something that implies pain. Pictures where an animal is involved in some form of sexual behaviour with a child

Source: M Taylor, G Holland and E Quayle, 'Typology of paedophile picture collections' (2001) 74(2) *The Police Journal* 97-107.

As O'Donnell and Milner comment, this typology was developed primarily from a psychological perspective and is more inclusive than any classification under the criminal law, particularly with its inclusion of 'indicative material' at Level 1.⁶⁵ The COPINE typology has become influential in clinical and in legal circles.

4.3 UK Sentencing Panel typology

This revised typology was formulated by the UK Sentencing Panel as part of its 2002 advice on the sentencing of offences involving child pornography. Its purpose was to provide for sentencers an objective standard for assessing the nature of child pornography material, in terms of the degree of harm done to the child or children involved. Noting that the COPINE typology was not designed for use by the courts, the Sentencing Panel concluded that it needed 'some modification, in particular to avoid unnecessary disputes in court as to the precise category into which a particular image falls'. Excluded from this revised scheme were images in COPINE category 1 (Indicative (non-erotic / nonsexualised pictures)) on the ground that 'images of this nature would not be classed as indecent'. It

⁶⁵ O'Donnell and Milner, n 50, p 94.

was further noted that images in COPINE categories 2-3 might be the subject of a dispute as to whether or not they were indecent. These were included at the lowest level of the Sentencing Panel scheme 'because there may be cases where an offender has been convicted, or pleaded guilty, solely on the basis of images of this nature'. In total five levels of material were identified by the Sentencing Panel according to the degree of harm to the victims, as follows.⁶⁶

Level	Description	Equivalent COPINE typology levels
1	Images depicting nudity or erotic posing, with no sexual activity	Levels 2, 3, 4, 5 and 6
2	Sexual activity between children, or solo masturbation by child	Level 7
3	Non-penetrative sexual activity between adult(s) and child(ren)	Level 8
4	Penetrative sexual activity between child(ren) and adult(s)	Level 9
5	Sadism or bestiality	Level 10

As noted, the relevant test for child pornography material in the UK is that of 'indecenty', for which harm to an actual child may or may not be a relevant factor, but where harm will be a critical factor in the sentencing of the offender.

4.4 The UK Court of Appeal

In the guideline judgment of *Oliver*,⁶⁷ the UK Court of Appeal (Criminal Division) accepted, subject to one revision, the Panel's analysis of increasing seriousness by reference to five different levels of activity. Speaking for the Court, Lord Justice Rose observed:

We do not that [sic] agree with the Panel that COPINE typologies 2 and 3 are properly within Level 1. As it seems to us, neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise, of itself, to a pornographic image. Accordingly, with that amendment to the Panel's proposals, we categorise the relevant levels as:

- (1) images depicting erotic posing with no sexual activity;
- (2) sexual activity between children, or solo masturbation by a child;
- (3) non-penetrative sexual activity between adults and children;
- (4) penetrative sexual activity between children and adults;
- (5) sadism or bestiality.

The difficulty, as already suggested, is with trying to account for the very different types of depictions that might be said to constitute child pornography. In the recent NSW case of *Drummond*,⁶⁸ for example, the surreptitious, 'up-skirt' filming of a 14 year old schoolgirl, depicting her 'legs, thighs, buttock, crotch area and underwear', was found 'in all the

⁶⁶ UK Sentencing Panel, *The Panel's advice to the Court of Appeal on offences involving child pornography*, 2002 - http://www.sentencing-guidelines.gov.uk/docs/advice_child_porn.pdf

⁶⁷ [2002] EWCA Crim 2766; [2003] 1 Cr App R 28.

⁶⁸ *DPP v Drummond* [2008] NSWLC 10.

circumstances' to constitute child pornography. Whether the same conclusion would be reached using the typology adopted in *Oliver* is doubtful.⁶⁹ Indeed, it raises the question whether such behaviour should be prosecuted under a new and separate offence, similar to the offence of intimate covert filming, which was introduced into the New Zealand *Crimes Act* in 2006. Section 216G of the Act defines an 'intimate visual recording' as one that is made 'without the knowledge or consent of the person who is the subject of the recording'. It includes the recording of:

a person's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—(i) from beneath or under a person's clothing; or (ii) through a person's outer clothing in circumstances where it is unreasonable to do so.⁷⁰

4.5 Comment

The introduction of a specific 'up-skirts' offence of this sort may be one issue for consideration in NSW. Another is whether a typology similar to that formulated by the UK Sentencing Panel is to be adopted by the courts in this jurisdiction, to provide an objective and consistent standard for assessing the nature of child pornography material? In fact, judicial reference is made in NSW to the COPINE typology. One instance is *R v Saddler*,⁷¹ where the offending material was said to involve images ranging right the way from Level 1 to the most extreme material found in Level 10.⁷²

However, in the same case Berman SC DCJ rejected any suggestion that the NSW courts should go one step further and take note of the sentencing guidelines laid down by the UK Court of Appeal in *Oliver*, saying that 'sentencing is essentially a local matter'.⁷³ In *Oliver* the UK Court of Appeal stated, for example, that 'In relation to more serious offences, a custodial sentence between twelve months and three years will generally be appropriate for (a) possessing a large quantity of material at Levels 4 or 5, even if there was no showing or distribution of it to others...'.⁷⁴ Reference was made to this aspect of the guideline

⁶⁹ For a discussion of the issues and case law see – AA Gillespie, 'Up-skirts and down-blouses: voyeurism and the law' (2008) 5 *Criminal Law Review* 370.

⁷⁰ *Crimes Act 1961* (NZ), s 216G - <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM329852.html> The provision also prohibits the unauthorized filming of persons in private where they are naked, engaged in intimate sexual activity, or showering, toileting, undressing and the like.

⁷¹ [2008] NSWDC 48 at [13].

⁷² See also a recent case of extreme images that were said to fall within Levels 8 to 10 - H Alexander, 'Woman jailed for child rape and bestiality photos', *SMH*, 15 August 2008 - <http://www.smh.com.au/news/national/woman-jailed-for-child-rape-photos/2008/08/15/1218307186451.html>

⁷³ [2008] NSWDC 48 at [81].

⁷⁴ [2002] EWCA Crim 2766 at [17].

judgment in the NSW case of *Power v DPP*, in which Acting Judge Boulton of the District Court observed in relation to *Oliver*: 'It is of course not a binding authority here but is helpful coming from a superior court in a not dissimilar context to our own'.⁷⁵ In *R v Saddler*, Berman SC DCJ would have none of it, stating he had 'some difficulty in understanding the relevance of guideline sentences issued in a foreign jurisdiction'.⁷⁶ He said:

The approach of New South Wales Courts to sentencing generally may well be, and is indeed likely to be, quite different from the approach to sentencing displayed by the courts in England. Whilst fundamental common law principles are likely to be similar in both jurisdictions, the selection of the appropriate sentence in any particular case will vary from one jurisdiction to another.⁷⁷

It is one thing to say therefore that NSW courts may take note and even adopt the COPINE typology, or some variation on its theme. It is quite another to suggest that sentencing standards are to be imported into NSW from the UK or elsewhere.

It can be added that in the recent case of *Mouscas v R* the NSW Court of Criminal Appeal rejected the relevance of Krone's typology of online child pornography offending. Price J (with whom Allsop P and James J agreed) stated:

I did not find in any event the article to be of assistance in considering the present appeal and, in my view, it is not material to which the Court ought to have regard. In particular, the determination of seriousness of offending by classifying offenders within particular groups is of limited use in individual cases.⁷⁸

In other words, the facts of each individual case are to be considered in terms of their own particularity and not in the context of a broad based categorization of types of offending. Counsel for Mouscas had sought to argue that, in terms of the Krone typology, the applicant was a 'Trawler' or more accurately an 'intense Trawler'. It was further submitted that the applicant's level of culpability was not at the 'upper-end', on the basis that he was not a 'Secure Collector', 'Groomer', 'Physical Abuser', 'Producer' or 'Distributor'.

⁷⁵ *Power v DPP* (unreported, 19 July 2007, NSWDC No 253) at [121].

⁷⁶ [2008] NSWDC 48 at [80].

⁷⁷ [2008] NSWDC 48 at [82].

⁷⁸ [2008] NSWCCA 181 at [12]. Counsel for Mouscas conceded that the article was not evidence within the meaning of s 12(1)(c) of the *Criminal Appeal Act 1912*, 'but merely intended to be of assistance to the Court in terms of research done in the area of child pornography'.

5. LEGISLATIVE FRAMEWORK

There are a number of arms to the regulation of child pornography, which in total traverses censorship, customs, crimes and broadcasting legislation, some of which is at State or Territory level and some at the federal level. Of these, it is the various crimes statutes and the Commonwealth customs legislation that are the most important legislative instruments in the fight against child pornography. For completeness, brief note is made of the censorship and broadcasting legislation.

5.1 Censorship law

Censorship in Australia is organised under a cooperative federal scheme. The administration of censorship is set out under Commonwealth *Classification (Publications, Films and Computer Games) Act 1995*, which establishes the Classification Board and the Classification Review Board. A schedule to the Act also sets out the National Classification Code, under which the classification standards and principles are established. Under this scheme child pornography is designated ‘RC’ or Refused Classification and is therefore banned. The relevant test or criteria refers to films, publications and computer games that

describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not).⁷⁹

Under the cooperative arrangements in place in Australia, the State and Territory statutes operate as enforcement Acts, setting out such matters as the conditions for the public exhibition or demonstration, sale or advertising of films, publications or computer games. In NSW the relevant legislation is the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, which also provides for penalties for relevant offences. Typically, the emphasis of this legislation, and indeed of the classification scheme as a whole, is on the commercial sale or display of classifiable material. It is not on the mere possession of such material, or even on its production or distribution for non-commercial purposes. Under the NSW Act, offences against possession or copying of ‘RC’ rated material (including child pornography) are in place, but only where possession is for the purpose of selling, exhibiting or demonstrating films, publications or computer games.⁸⁰ Generally, possession of child pornography, or its production for non-commercial purposes is dealt with under State or Territory crimes legislation. The exception is Western Australia where the publication, display, possession or copying of child pornography are offences under the State’s *Classification (Publications, Films and Computer Games) Enforcement Act 1995*.⁸¹

⁷⁹ In 2006-07 one film was refused classification on this ground. This film was in the form of a DVD and not a film for public exhibition in a cinema. No publications or computer games were refused classification on this ground – Classification Board and Classification Review Board, Annual Report 2006-07, pp 41-45.

⁸⁰ *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW), ss 18, 26 and 37.

⁸¹ *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA), s

5.2 State censorship law and the Internet

In NSW the censorship legislation does not provide for the classification of online material. A new Part 5A to the Classification Act was passed in 2001 but it has not been proclaimed to commence.⁸² Other than the Commonwealth, three jurisdictions have introduced provisions regulating Internet content, namely, Victoria, Western Australia and the Northern Territory. Section 57A of the Victorian *Classification of Publications, Films and Computer Games (Enforcement) Act 1995* creates an offence of publishing or transmitting child pornography as follows:

A person who *knowingly* uses an *on-line information service* to publish or transmit, or make available for transmission, *objectionable material* that describes or depicts a person who is, or looks like, a minor engaging in sexual activity or depicted in an indecent sexual manner or context is guilty of an indictable offence and liable to a term of imprisonment not exceeding 10 years. (emphasis added)

The prosecution must establish mens rea (guilty mind) as an element of the offence. The prosecution must prove the accused knowingly used the on-line service for the purpose of publishing, transmitting or making available for transmission the objectionable material. The terms 'objectionable material' and 'on-line information service' are defined by s 56.

Similarly, ss 99-102 of Western Australia's *Classification (Publications, Films and Computer Games) Enforcement Act 1995* regulate the Internet, with s 101 making it an offence to use a computer service to knowingly transmit or request the transmission of, obtain possession of, demonstrate, or advertise 'objectionable material'. By s 99, 'objectionable material' is defined to include child pornography. Sections 50X-50ZA of the Northern Territory's *Classification of Publications, Films and Computer Games Act 1985* are in similar terms.

5.3 Commonwealth Broadcasting Services Act and the Internet

Unlike the relevant State, Territory and federal criminal laws, the Commonwealth *Broadcasting Services Act 1992* does not regulate either producers of online content, or persons who upload or access content. Instead, as first introduced by amending legislation in 1999, regulation was confined to Internet Service Providers (ISPs) and Internet Content Hosts (ICHs). Originally, the regulatory scheme was inserted under Schedule 5 to the principal Act. A revised framework was introduced by the *Communications Legislation Amendment (Content Services) Act 2007*. The major difference is that under this new scheme ISPs are still regulated under Schedule 5 whereas content hosts are now regulated under the new Schedule 7, which is headed 'Content Services'. Basically, the purpose of this legislation is to deal with the challenges posed by the new convergent technologies, such as broadband services to mobile handsets, by extending the coverage of the Internet

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⁸² *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW).

content laws beyond material ‘stored’⁸³ on the Internet to include ‘live’ or ephemeral convergent content services. This last category includes streamed audiovisual material and interactive chat services. Schedule 7 regulates ‘*content service providers*’, a term that is defined broadly to include ‘a service that allows end-users to access content using a carriage service’.⁸⁴ The development of industry codes is provided for, in a scheme that is co-regulatory in nature.

In summary, Schedule 7 of the *Broadcasting Services Act 1992* (Cth) establishes a complaints based system by which a person may make a complaint to the Australian Communications and Media Authority (ACMA) about *prohibited content* or *potential prohibited content* on the Internet. Where the content is related to a content service provider with an ‘Australian connection’ the ACMA may:

- in the case of a hosting service – issue a take-down notice;
- in the case of a live content service – issue a service cessation notice;
- in the case of a links service – issue a link-deletion notice.

‘Prohibited content is defined as content that has been classified ‘RC’ by the Classification Board, an approach that refers back to the National Classification Code and its definition of child pornography material. To determine whether content is *potential prohibited content*, the ACMA refers the content of the complaint to the Classification Board for decision. As discussed in an earlier section of this paper, this is what occurred in the context of the ‘Bill Henson affair’ and in respect to the July 2008 issue of *Arts Monthly Australia*. The Classification Board’s 2006-07 annual report records 28 Schedule 7 referrals by the ACMA.

5.4 Commonwealth Customs legislation

Prosecutions are undertaken pursuant to s 233BAB of the *Customs Act 1901* (Cth), which contains offences for the importation and exportation of, amongst other things, child pornography and child abuse material in hard copy. Basically, ‘child pornography’ and ‘child abuse material’ are declared to be Tier 2 goods the importation or exportation of which is an offence, punishable by a fine of \$250,000 and/or imprisonment for 10 years. To prove the offence, the prosecution must establish:

- the person intentionally imported/exported the goods;
- the goods were Tier 2 goods and the person was reckless as to that fact;⁸⁵ and

⁸³ This refers to content kept on a data storage device.

⁸⁴ Various exceptions apply, including for an ‘exempt parliamentary content service’ and a licensed free-to-air broadcasting service.

⁸⁵ By s 5.4 of the Commonwealth *Criminal Code 1995* a person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. This was applied in *Hann v Commonwealth DPP* [2004] SASC 86, a case in which a man was found importing four video discs, one labeled ‘Innocent Girl in Sex – 15 year old’, which he had bought in an unregulated market in Bangkok. The Court found that

- their importation/exportation was prohibited under the Customs Act (either absolutely or, if the goods could be imported/exported subject to approval, that approval had not been obtained).⁸⁶

For the relevant goods to constitute Tier 2 goods they have to satisfy either the definitions of ‘child pornography’ or ‘child abuse material’ provided under section 233BAB. These definitions were inserted by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth). The same definitions were inserted into the *Criminal Code* (Cth) for the purposes of Internet related child pornography and child abuse material offences. They are discussed below under the heading ‘Commonwealth Criminal Code and Internet offences’. It is enough to note that, for s 233BAB *Customs Act* offences, certain specified ‘matters’ are to be taken into account in deciding ‘whether reasonable persons would regard a particular document or other goods as being, in all the circumstances, offensive’. These ‘matters’ are identical to those set out under s 473.4 of the *Criminal Code* (see below).

The Classification Board also plays a role under the Commonwealth Customs legislation, specifically by giving advice to the Australian Customs Service to help it make decisions under the Prohibited Imports Regulations (Regulation 4A) and the Prohibited Export Regulations (Regulation 3). The criteria in these Regulations correspond with the RC (Refused Classification) criteria in the National Classification Code.⁸⁷ It is under these Regulations that approval may be given for the importation/exportation of otherwise prohibited goods.

Note that, according to the Board’s 2006-07 annual report, advice was provided in relation to five seized items.⁸⁸ This figure has been trending downward in recent years, as follows: 17 in 2005-06; 24 in 2004-05; 27 in 2003-04; 40 in 2002-03; 81 in 2001-02; 551 in 2000-

‘He made no enquiry as to content. To purchase pornographic material in these circumstances carried the obvious risk that the pornography may be other than adult pornography and may include child pornography. That risk was not remote or fanciful; to the contrary the risk was substantial...I am satisfied that the element of recklessness has been established beyond reasonable doubt’ (at para 33).

⁸⁶ Absolute liability applies in respect to the last element of the offence, which means that no defence is available to the accused. However, an exception is made for the physical element of the circumstances of the offence, specifically in respect to the fact that an approval had not been obtained at the time of importation/exportation. Strict liability applies in this respect, which means that the defence of ‘mistake of fact’ is available to the accused. For example, where goods could be imported/exported subject to approval, it would be open to an accused to argue that he/she believed approval had been obtained from the appropriate authority (see sections 6.1 and 9.2 of the *Criminal Code* (Cth)). This would not apply where the goods are prohibited absolutely and where no defence would be available to the accused (see s 6.2 of the *Criminal Code* (Cth)).

⁸⁷ That is, materials that ‘describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)’.

⁸⁸ Classification Board and Classification Review Board, *Annual Report, 2006-07*, p 49.

01. Presumably, this downward trend is owing to the availability of material on the Internet, which by-passes the need to import/export hard copy material physically across the border. One would expect most contemporary prosecutions to be initiated by the Australian Federal Police further to the Internet related offences under the Commonwealth Criminal Code.

5.5 Commonwealth Criminal Code and Internet offences

In the Second Reading speech for the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* it was explained that

The bill contains new offences dealing with the use of the Internet to access, transmit and make available child pornography and child abuse material, as well as the possession or production of such material with intent to place it on the Internet. These offences complement existing offences prohibiting the importation of such material into Australia and will carry a maximum penalty of 10 years imprisonment.

The Second Reading speech continued:

Law enforcement agencies estimate that around 85 per cent of child pornography seized in Australia is distributed via the Internet...By focusing on the Internet, these new federal offences target the very heart of the abhorrent child pornography industry.⁸⁹

5.5.1 Child pornography material defined: One feature of the legislation is that it distinguishes between '*child pornography material*' and '*child abuse material*', another is that it provides in s 473.1 an elaborate and detailed definition of 'child pornography material'. This is defined to cover a range of material including that which depicts or describes persons under 18, or who appear or are implied to be under 18, engaged in a sexual pose or sexual activity, or in the presence of a person who is engaged in a sexual pose or sexual activity. The definition also covers material the dominant characteristic of which depicts for a sexual purpose the sexual organs, the anal region or the breasts (in the case of a female) of a person who is under 18. The word 'material' is defined broadly to include 'material in any form, or combination of forms, capable of constituting a communication'.

The qualification is that the relevant material depicts or describes such a person *in a way that reasonable persons would regard as being, in all the circumstances, offensive*. As the Explanatory Memorandum states:

⁸⁹ *Commonwealth Parliamentary Debates (House of Representatives)*, 4 August 2004, p 32035.

The qualification requiring that reasonable persons must regard the material, given all the circumstances, as offensive allows community standards and common sense to be imported into a decision on whether material is offensive.⁹⁰

Section 473.4 lists the matters that should be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive. Consistent with the approach adopted in the *Customs Act*, these are as follows:

- the standards of morality, decency and propriety generally accepted by reasonable adults;
- the literary, artistic or educational merit (if any) of the material, and;
- the general character of the material (including whether it is of a medical, legal or scientific character).

For the purpose of the definition, the depiction may be of a person who ‘appears’ to be under 18, or a description may be of a person who is ‘implied’ to be under 18. According to the Explanatory Memorandum:

Material that does not necessarily contain actual images of children is covered by the definition, because although it may not directly involve an abused child in the production, its availability can fuel further demand for similar material. This can lead to greater abuse of children in the production of material to meet this demand.⁹¹

Note that separate but corresponding definitions of child pornography material are set out, first by reference to material that ‘depicts’ and secondly by reference to material that ‘describes’ child pornography. The purpose of this distinction is to place beyond doubt the application of the statutory scheme to both visual (depictions) and textual (descriptions) materials.⁹² As stated in the Explanatory Memorandum:

Paragraphs (a) and (b) of the definition deal with ‘depictions’ and are intended to cover all visual images, both still and motion, including representations of children, such as cartoons or animation. Paragraphs (c) and (d) deal with ‘descriptions’ and are intended to cover all wordbased material, such as written text, spoken words and songs.⁹³

⁹⁰ Explanatory Memorandum, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004* - <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/oldEms/Linked/14090400.pdf>

⁹¹ Explanatory Memorandum, n 90.

⁹² In the first case, reference is made to ‘*material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age*’; in the second reference is made to ‘*material that describes a person who is, or is implied to be, under 18 years of age*’.

⁹³ Explanatory Memorandum, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004* - <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/oldEms/Linked/14090400.pdf>

5.5.2 Child abuse material defined: The definition of ‘child abuse material’ follows the same structure, with a distinction being made between depictions and descriptions. The same community standards or reasonable persons test also applies. Child abuse material is defined in s 473.1 to cover material that depicts or describes a person who is under 18, or who appears or is implied to be under 18, *as a victim of torture, cruelty or physical abuse*, and does so in a way that reasonable persons would regard as being, in all the circumstances, offensive.

5.5.3 Offences: As set out in Table 1, separate but corresponding offences are provided in relation to ‘child pornography material’ and ‘child abuse material’. For both, the following primary offences apply:

- **primary offences:** by *Criminal Code*, s 474.19(1)(a)(i)-(v)) the use of a telecommunications carriage service with intent to access, cause material to be transmitted, transmit, publish or distribute *child pornography material* is an offence. Similarly, by s 474.22(1)(a)(i)-(v) the use of a telecommunications carriage service with intent to access, cause material to be transmitted, transmit, publish or distribute *child abuse material* is an offence.

In respect to these primary offences, intent is the fault element for the relevant conduct involved, while recklessness is the fault element for the relevant circumstances concerned.⁹⁴ By operation of these fault elements, a person who accidentally comes across child pornography on the Internet would not be caught by the offences, because they would not have had any awareness that the material they were accessing was in fact child pornography.⁹⁵

The following preparatory offences also apply:

- **preparatory offences:** by s 474.20(1)(a)(i) and (ii) it is an offence to possess or control *child pornography material*, or to produce, supply or obtain such material, with the intention that the material be used by that person or another person in committing an offence against s 474.19 (the primary offence). Similarly, by s 474.23(1)(a)(i) and (ii) it is an offence to possess or control *child abuse material*, or to produce, supply or obtain such material, with the intention that the material be used by that person or another person in committing an offence against s 474.22 (the primary offence).⁹⁶

⁹⁴ The meanings of intention and recklessness are set out in ss 5.2 and 5.4 of the *Criminal Code*. A person has intention with respect to conduct if he or she means to engage in that conduct. A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

⁹⁵ Explanatory Memorandum, n 90.

⁹⁶ Sections 473.2 and 473.3 of the *Criminal Code* (Cth) outline situations that are considered ‘possession or control of material in the form of data’ or ‘producing, supplying or obtaining material in the form of data’ for the purposes of this proposed offence.

These offences cover a broad range of preparatory conduct undertaken with the intention to commit the primary offences. For example, the offence under s 474.20(1)(a)(i) would apply to the possession of a pornographic photograph of a child, provided the person with possession intended that the photograph be made available on the Internet. The offence under s 474.20(1)(a)(ii) would apply to the actual production of child pornography, if persons involved in the production intended to place the material on the Internet.⁹⁷

It is provided that the mere ‘attempt’ to commit an offence under ss 474.20(1) and 474.23(1), for example, the attempt to possess child pornography or child abuse material with the intention of publishing it on the Internet, does not constitute an offence.⁹⁸ However, if such material is possessed by the accused and the intention to publish it on the Internet is proved, then the accused may be found guilty even if committing an offence against the primary offence ‘is impossible’.⁹⁹ For instance, a person may have possession of child pornography material and may have provided it to another person with the intention that the material be published on the Internet. Even if that other person does not have access to a computer, the accused may still be found guilty.

5.5.4 Defences: Various specific defences apply to all the above offences, for which the defendant bears the evidential burden in all cases. These include where:

- the defendant’s conduct is of public benefit, this being a question of fact and not of the person’s motives in engaging in the conduct. This can only apply in limited and defined circumstances, for instance, where the conduct is necessary for or of assistance in enforcing an Australian law, or in conducting approved scientific, medical or educational research.
- the person is a law enforcement, intelligence or security officer acting in the course of his duties and the person’s conduct is reasonable in those circumstances.
- if the conduct is in good faith and is for the sole purpose of assisting the Australian Communications and Media Authority to detect prohibited content or some other related activity.

Note that, unlike in most other Australian jurisdictions, the Commonwealth law does not provide a specific defence for artistic work. However, by s 473.4, ‘the literary, artistic or educational merit (if any) of the material’ is one of the matters to be taken into account in deciding whether reasonable persons would regard material as being, in all the circumstances, offensive.

⁹⁷ Explanatory Memorandum, n 90.

⁹⁸ *Criminal Code* (Cth), s 474.20 (3) and s 474.23(3).

⁹⁹ *Criminal Code* (Cth), s 474.20 (2) and s 474.23(2). According to the Explanatory Memorandum, ‘This provision reflects the emergent common law consensus that a person can be convicted of attempt – here, essentially a preparatory offence – even though completion of the offence was impossible in the circumstances. In other words, the law of attempt holds that it is irrelevant if a particular result does not occur’.

The different Commonwealth offences under the *Criminal Code* and the *Customs Act* are set out in Table 1.

Table 1 - Commonwealth Criminal Code Internet and Customs Importation/Exportation offences - Child pornography/child abuse material

Statute/ Section	Category of offence	Subject/Victim	Statutory Tests	Offence	Maximum penalty
<i>Criminal Code Act</i>, s 474.19 (1)(a)(i)-(v)	Child pornography (CP) material, as defined by s 473.1	<i>Depicts</i> person, or representation of person who is, or <i>appears to be</i> , under 18; or <i>describes</i> person who is, or is <i>implied to be</i> , under 18	CP material offensive to reasonable persons in all circumstances	Use of telecommunications carriage service with intent to access, cause material to be transmitted, transmit, publish or distribute CP material	10 years imprisonment
474.20 (1)(a)(i)	As above	As above	As above	Possession or control of CP material with intent to commit offence under s 474.19	10 years imprisonment
474.20 (1)(a)(ii)	As above	As above	As above	Produces, supplies or obtains CP material with intent to commit offence under s 474.19	10 years imprisonment
474.22 (1)(a)(i)-(v)	Child abuse (CA) material, defined in terms of depicting or describing 'torture, cruelty or physical abuse' of victim	As above	CA material offensive to reasonable persons in all circumstances	Use of telecommunications carriage service with intent to access, cause material to be transmitted, transmit, publish or distribute CA material	10 years imprisonment
474.23 (1)(a)(i)	As above	As above	As above	Possession or control of CA material with intent to commit offence under s 474.22	10 years imprisonment
474.23 (1)(a)(ii)	As above	As above	As above	Produces, supplies or obtains CA material with intent to commit offence under s 474.22	10 years imprisonment
<i>Customs Act</i>, s 233BAB	Importation/exportation of Tier 2 goods, specifically items of CP or CA material, as defined by s 233BAB (3) and (4)	As above	CP or CA material offensive to reasonable persons in all circumstances	Intentionally imported or exported Tier 2 goods, specifically prohibited items of CP or CA material	10 years imprisonment and fine

5.6 New South Wales child pornography offences

The amendment of Commonwealth child pornography laws in 2004 coincided with changes at the State and Territory levels, the main purpose of which was to increase maximum penalties following Operation Auxin.¹⁰⁰ The focus of the following account of these laws is on NSW, except where other jurisdictions depart markedly from this model. The relevant provisions are set out in Table 2.

In NSW child pornography offences were transferred from ss 578B and C of the *Crimes Act 1901* to a new s 91H. The offences of production, dissemination or possession of child pornography were made indictable offences, able to be dealt with in the District Court by a jury.¹⁰¹ Further, maximum penalties were increased from 2 to 5 years for the possession of child pornography, and from 5 to 10 years for the production or dissemination of child pornography.¹⁰²

Section 91H of the *Crimes Act* is headed ‘Production, dissemination or possession of child pornography’. The offence of production or dissemination of child pornography is provided under s 91H(2), while the possession offence is provided for under s 91H(3). The offences state simply that a person who produces, disseminates or possesses child pornography, as the case may be, is guilty of an offence.

Unlike the Commonwealth regime, intention is not expressed to be an element of these offences. However, *Clark v R* confirmed the common law requirement for the ‘Crown to prove, when charging possession of some thing or some material, that the accused’s possession is intentional’.¹⁰³

Likewise, unlike the Commonwealth and some State regimes (South Australia and Tasmania), express reference is not made in s 91H to the *accessing* of child pornography material. The question whether the intentional accessing of such material amounts to possession was considered in *Gibbons v Evans*,¹⁰⁴ where Adams J found that the access in question did amount to possession.

¹⁰⁰ NSWPD, 11 November 2004, p 12738.

¹⁰¹ *Criminal Procedure Act 1986* (NSW), Schedule 1.2. It was further provided that an intervention program could not be conducted in respect to these offences – *Criminal Procedure Act 1986* (NSW), s 348(2)(d).

¹⁰² *Crimes Amendment (Child Pornography) Act 2004* (NSW). Note that prior to 1995 the mere possession of child pornography was not an offence. Section 578B (possession of child pornography) was inserted into the NSW *Crimes Act* by *Classification (Publications, Films and Computer Games) Enforcement Act 1995*. This followed a recommendation made by the Australian Law Reform Commission in its report *Censorship Procedure* (Report No 55, 1991), p 52.

¹⁰³ [2008] NSWCCA 122 at [227]. In that particular case this involved proof that the appellant knew that the computer data concerned were ‘present and retrievable’ (at para 247). Note that s 7 of the NSW *Crimes Act* is a deeming provision in respect to ‘possession’.

¹⁰⁴ [2008] NSWSC 495 at [7]. This case related to the validity of a search warrant.

By s 91H(1) child pornography is defined as:

material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years:

- (a) engaged in sexual activity, or
- (b) in a sexual context, or
- (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

In terms of the types of activity which constitutes child pornography, unlike the elaborate approach adopted under Commonwealth law, the NSW provision is more generic in nature, referring only to 'engaged in sexual activity' and 'in a sexual context'. Potentially, the reference to 'in a sexual context' is broad enough to admit of a wide range of images, including those from Levels 2 and 3 of the COPINE typology. It may encompass such things as pictures of naked children from legitimate nudist settings, where the actual depictions are found to dwell on these images and where, in all the circumstances, they cause offence to reasonable persons. The qualification that the material must 'in all the circumstances cause offence to reasonable persons' is a community standards test which, as explained by the Second Reading speech for the *Crimes Amendment (Child Pornography) Act 2004*, 'ensures that innocent family photographs of naked children, for example, will not be captured'.¹⁰⁵ At any rate, it is left to the courts to decide what amounts to 'a sexual context' in any particular set of circumstances. As amended in 2004, reference is also made to 'torture, cruelty or physical abuse (whether or not in a sexual context)', which under the Commonwealth model is treated separately as 'child abuse material'.

By its reference to 'depicts' and 'describes' the definition covers both visual images and textual content. The word 'material' is separately defined under s 91C to include 'any film, printed matter, electronic data or any other thing of any kind (including any computer image or other depiction)', an approach that is designed to encompass computer generated virtual child pornography. Presumably, this would cover the kinds of 'morphed images' discussed in an earlier section of this paper.

The NSW provision departs from the Commonwealth model by defining a child in this context as 'a person under (or apparently under) the age of 16 years'. The relevant age in Commonwealth law is 18, as it is in Tasmania, Victoria, the ACT and the Northern Territory. While this higher age is consistent with the UN definition of 'child', it may raise the question whether any filmic or other representation of a 16 or 17 year old in a sexual context could be the subject of legal challenge.¹⁰⁶

¹⁰⁵ NSWPD, 11 November 2004, p 12738. 'Disseminate' is defined broadly under s 91H(1) to include: (a) sending, supplying, exhibiting or communicating child pornography to another person; or (b) making it available for access by another person; or (c) entering into an agreement or arrangement to do so.

¹⁰⁶ One answer is that, under the defence provisions, it would depend on the purpose (artistic or otherwise) for which the material was produced. In its 1991 report on *Censorship Procedure* the Australian Law Reform Commission acknowledged a potential grey area in this respect, noting 'If the definition of child pornography were not limited to children under

Consistent with most other Australian jurisdictions, the NSW definition also applies to a subject or victim of child pornography who is ‘apparently’ under 16, and therefore extends to cover those situations where there is no means of knowing or proving the actual age of the person. As explained in the South Australian case of *R v Clarke*, in relation to a comparable formulation:

The reason for a provision of this kind is obvious. It will often be impossible to identify the person the subject of pornography, and so impossible to prove the person’s age.¹⁰⁷

The current definition of child pornography only dates back to 2004. Before then the definition under repealed s 578B was tied closer to censorship law as it relied on the material being classified as Refused Classification.¹⁰⁸ For this purpose, a certificate signed by the Director of the Classification Board was taken to be ‘prima facie evidence’ that the material was or was not child pornography. This nexus was broken in 2004. As the then Attorney General commented in the Second Reading speech, ‘The new definition will allow courts to make their own determination as to whether material is or is not child pornography’.¹⁰⁹ A residual connection to censorship law continues, however, as explained below in relation to the provided under the current s 91H.

By s 91H(4), in total 5 defences apply to all production, dissemination and possession offences, as follows:

- the material was classified under the Commonwealth legislation, other than as ‘RC’;

16, some publications and films would be “child pornography” yet would not be classified RC [Refused Classification]’ - Australian Law Reform Commission, *Censorship Procedure*, Report No 55, 1991, p 53.

¹⁰⁷ [2008] SASC 100 at [19]. In that case it was found that the statutory regime imposes absolute liability in relation to the age of the person involved (paras 59 and 103). See also s 229 of the Queensland *Criminal Code Act 1899* which provide that knowledge of age is immaterial.

¹⁰⁸ That is, on that ground that it described or depicted ‘in a way *likely to cause offence to a reasonable adult*, a person (whether or not engaged in sexual activity) who is a child under 16 or who *looks like* a child under 16’. The current definition is closer to the formulation of the appropriate community standards test under Commonwealth law, which directs attention to what is in fact offensive in ‘all the circumstances’, according to the standards of ‘reasonable persons’.

¹⁰⁹ *NSWPD*, 11 November 2004, p 12738. It was further explained that: ‘The controversy [subsequent to Operation Auxin] of this amendment is well known, and has been substantially exaggerated. For the record, let me say that police legal services sought the advice of the Crown Advocate to clarify whether the commencement of any prosecution was in doubt because they had not yet been classified. The Crown Advocate advised that a court was unlikely to accept an argument that a person cannot be charged before classification, but recommended, however, for abundant caution that a retrospective clarifying amendment would put the matter beyond doubt’.

- that the defendant was acting in the course of his/her official duties under the Commonwealth Classification Act;
- that the defendant was a law enforcement officer acting in the course of his/her official duties;¹¹⁰
- that the defendant was acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose, and the conduct was reasonable for that purpose. As the then Attorney General observed in 2004, 'In determining whether the defence was available, regard will need to be had to the circumstances in which the material was produced, used or intended to be used. This defence would cover, for example, news or current affairs programs reporting images of children injured in a war, or medical texts, if that material has not been classified. It would also cover people who report cases of child abuse to the authorities'.¹¹¹
- that the defendant did not know, *and could not reasonably be expected to have known*, that he or she produced, disseminated or possessed child pornography. According to the then Attorney General, 'This would exempt from liability a person who passes on a computer disk without knowing that a pornographic image was buried in one of its files. The requirement that a defendant establish that he or she *could not reasonably be expected to have known* that they produced, disseminated or possessed child pornography means that a defendant cannot escape liability simply by asserting that they did not know the material contained child pornography. It adds an objective element to the defence'.¹¹²

A further defence applies only to the possession offence under s 91H(3). Quoting the then Attorney General again:

The defence is available where the material came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it. A prime example of where this defence would apply is where a person receives unsolicited or spam email containing child pornography, and he or she attempts to delete it as soon as they realise what it is.

As noted, the maximum penalty is 5 years for the possession of child pornography, and 10 years for the production or dissemination of child pornography. However, unless the prosecutor or the person charged elects otherwise, the offences under s 91H are to be prosecuted summarily in the Local Court, in which case the maximum penalty is no more than 2 years imprisonment.¹¹³

¹¹⁰ Unlike the Commonwealth defences, there is no express requirement that the classification or law enforcement officer's conduct must be 'reasonable in those circumstances', which is not to say that the courts would not read such a requirement into the provisions as they stand (ss 91H(4)(d) and (e)).

¹¹¹ NSWPD, 11 November 2004, p 12738.

¹¹² NSWPD, 11 November 2004, p 12738.

¹¹³ *Criminal Procedure Act 1986* (NSW), ss 260 and 267(2) read with Schedule 1.2.

5.7 Child pornography offences in other States and Territories

The following overview of comparable provisions in other States and Territories is conducted by reference to: definitions; elements; and defences. The maximum penalties available in each jurisdiction are set out in Table 2.

5.7.1 Definitions: The fact that the definition of ‘child’ varies in this context, from under 16 to under 18, has been discussed. It has also been noted that ‘child pornography material’ is not a term that is employed in all Australian jurisdictions. *Queensland, Tasmania and Northern Territory* depart from this model. Queensland and Tasmania refer to ‘child exploitation material’, whereas the preferred term in the Northern Territory is ‘child abuse material’. It might be argued that both these formulations refocus the relevant offences, away from the pejorative word ‘pornography’, towards the real evil concerned, the exploitation or abuse of children. In other respects, however, the definitions are not substantially different to the NSW model. All three make reference to the abuse, cruelty or torture towards children. In Queensland and the Northern Territory added reference is made to depictions or descriptions that are in an ‘offensive or demeaning context’.

In *Victoria*, the *Crimes Act 1958* refers in a less detailed way to a minor depicted or described ‘engaging in sexual activity or depicted in an indecent sexual manner or context’. It would seem that the second limb of this definitions covers only ‘depictions’ and will be decided by reference to the common law’s definition of ‘indecenty’. Further, the abuse, cruelty or torture towards children does not feature in the definition.

Under *Western Australia* censorship legislation an even broader, less particularised approach is adopted, referring only to material that ‘describes or depicts, in a manner that is likely to cause offence to a reasonable adult, a person who is, or who *looks like*, a child under 16 years of age (whether the person is engaged in sexual activity or not)’.

Different again are *South Australia* and the *ACT*. The South Australian provision includes reference to ‘the image of a child or bodily parts of a child’, whereas the ACT provision includes reference to where ‘someone else’ is ‘engaged in an activity of a sexual nature in the presence of a child’. However, in both cases the more novel aspect of the definitions is their inclusion of the purpose for which the material was produced. In the ACT the representation must be ‘substantially for the sexual arousal or sexual gratification of someone other than the child’. In South Australia the material must be ‘intended or apparently intended – (i) to excite or gratify sexual interest; or (ii) to excite or gratify a sadistic or other perverted interest in violence or cruelty’. As the relevant Second Reading speech commented, this qualification ensures that such things as ‘advertising brochures for children’s clothing and underwear, would not be caught by the definition’. It was also explained that, as it would be unduly onerous to require proof of the actual intention in every case, ‘If the finder of fact finds that the intention to excite or gratify a sexual or other specified interest is apparent on the face of the material presented to it, the behaviour will also be caught’.¹¹⁴ Another unique feature of the South Australian Act is that, by s 63C(1) it expressly provides that:

¹¹⁴

SAPD (House of Assembly), 26 October 2004, p 561.

In determining whether material to which a charge of an offence relates is of a pornographic nature, the circumstances of its production and its use or intended use may be taken into account but no such circumstance can deprive material that is inherently pornographic of that character.

In the other jurisdictions such contextual and purposive considerations are subsumed under the broader consideration that the material in question must, in all the circumstances, be offensive to reasonable persons.

5.7.2 Elements of offences: As set out in s 91H of the *Crimes Act 1900*, the elements of the relevant offences in *NSW* are that the accused either

produced,
disseminated or
had in his/her possession
child pornography.

As NSW is a common law jurisdiction, much will depend on the way the courts interpret these elements. As noted, it has been held that the Crown must prove that the accused's possession was intentional.¹¹⁵ The statutory approach in most other States and Territories is different. In *Queensland* and *Victoria* it is expressly stated that the accused must be proved to have *knowingly* possessed child exploitation or child pornography material, as the case may be.¹¹⁶ The same does not apply in respect to the production and distribution offences in these States, which indicates they are to be treated as absolute liability offences.

Under *Tasmania's Criminal Code* (ss 130A-130C) separate offences are created in respect to the production, distribution and possession of child exploitation material. For all three, in addition to proving that the accused produced, distributed (or had done anything to facilitate production or distribution) or was in possession of prohibited material, the Crown must establish that he/she 'knows, or ought to have known, that the material is child exploitation material'. By formulating the test in this objective way, in terms of what the accused ought to have known, it is clear that the prosecution need only prove recklessness as to the circumstances of the offence. By s 130D a specific offence is created for 'accessing child exploitation material', the elements of which are that the accused: (a) intended to access such material; (b) he/she accessed the material.

Again, a different approach is taken in *South Australia*. Section 63 of the *Criminal Law Consolidation Act 1935* provides:

A person who—
(a) produces, or takes any step in the production of, child pornography knowing of its pornographic nature; or

¹¹⁵ *Clark v R* [2008] NSWCCA 122 at [227].

¹¹⁶ Section 228D of the *Queensland Criminal Code* provides, 'A person who knowingly possesses child exploitation material commits a crime'. See *Crimes Act 1958* (Vic), s 70.

(b) disseminates, or takes any step in the dissemination of, child pornography knowing of its pornographic nature,
is guilty of an offence.

When this is combined with the definition of child pornography, as discussed above, the elements of the offence are that the accused:

produced or disseminated (or took steps in the production or dissemination)
child pornography
knowing of its pornographic nature
including that the material was intended or apparently intended to excite or gratify sexual interest or a sadistic or other perverted interest in violence or cruelty.

The possession offence under s 63A(1)(a) is in similar terms. By s 63A(1)(b) there is also a separate ‘access’ offence. This does not make express reference to knowledge as a fault element. Rather, reference is made to the intention to access child pornography. The section refers to a person who

intending to obtain access to child pornography
obtained access to such material, or
took steps towards accessing such material.

5.7.3 Defences: The specific statutory defences set out in the NSW legislation are for the most part similar to those in other States and Territories. Inevitably, there are departures from this rule. The *Northern Territory* defences under s 125B of the Criminal Code makes reference to ‘legitimate medical or health research purposes’ but not to work of an artistic nature.

In other jurisdictions it is more the additions rather than omissions which are noteworthy. The *Tasmanian* defences under s 130E(2) of the *Criminal Code Act 1924* include reference to where the sexual activity depicted between the accused and a person under 18 ‘is not an unlawful sexual act’. This may be intended to refer to where the participants involved are married, a precaution which may follow from defining ‘child’ in this context as a person under 18 years of age.

This is made explicit under s 70(2)(c) of *Victoria’s Crimes Act 1958* which provides a defence against the offence of possession of child pornography where the ‘the defendant believed on reasonable grounds that the minor was aged 18 years or older *or that he or she was married to the minor*’ (emphasis added).¹¹⁷ The Victorian defence of artistic merit is also exclusive to the possession offence and is qualified by the fact that it ‘cannot be relied on in a case where the prosecution proves that the minor was actually under the age of 18 years’.

¹¹⁷

Other defences that apply exclusively to the possession offence include: (d) that the defendant made the film or took the photograph or was given the film or photograph by the minor and that, at the time of making, taking or being given the film or photograph, the defendant was not more than 2 years older than the minor was or appeared to be; or (e) that the minor or one of the minors depicted in the film or photograph is the defendant.

In respect to the offence of possession, in the **ACT** it is a defence if the accused can prove that he/she had 'no reasonable grounds for suspecting that the pornography concerned was child pornography' (*Crimes Act 1900*, s 65(3)).

Table 2 – Child Pornography Offences Under State and Territory Legislation

Jurisdiction	Statute/Section	Category of offence	Subject/victim and nature of depiction	Offence	Maximum penalty
NSW	Crimes Act, s 91H(2)	Production or dissemination of child pornography (CP).	Depicts or describes person under, or apparently under, 16 - (a) engaged in sexual activity; (b) in a sexual context; or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).	Production or dissemination of CP .	10 years imprisonment.
NSW	Crimes Act, s 91H (3)	Possession of CP material.	As above.	Possession of CP .	5 years imprisonment.
Qld	Criminal Code ss 228B and C	Making or distributing child exploitation (CE) material.	Depicts or describes someone who is, or apparently is, a child under 16 – (a) in a sexual context; (b) in an offensive or demeaning context; or (c) being subjected to abuse, cruelty or torture.	Making or attempting to make, or distributing or attempting to distribute (CE) Material.	10 years imprisonment.
Qld	Criminal Code s 228D	Possession of CE material.	As above.	<i>Knowingly</i> in possession of CE material.	5 years imprisonment.
SA	Criminal Law Consolidation Act, s 63	Production or dissemination of CP .	Describes, depicts child under, or apparently under 16 engaging in sexual activity; or image of child under 16, or image of bodily parts of child, that is intended to excite or gratify sexual interest or a sadistic or related interest.	Production or dissemination of CP (or taking steps thereto) <i>knowing</i> of its pornographic nature.	10 years imprisonment (12 years if child under 14 years).
SA	Criminal Law Consolidation Act, s 63A	Possession of CP .	As above.	Possession of CP <i>knowing</i> of its pornographic nature, or intending to access CP .	5 years for first offence (7 years if child under 14).
Tas	Criminal Code Act, ss 130A, B and C	Production, distribution and possession of CE material.	Depicts or describes person under, or apparently under, 18 - (a) engaged in sexual activity; (b) in a sexual context; or (c) as the subject of torture, cruelty or physical abuse (whether or not in a sexual context).	Produces, distributes or possesses CE material and <i>knows</i> , or ought to have known, it is CE material	No statutory maximum penalty.
Tas	Criminal Code Act, s 130D	Accessing CE material.	As above.	Accessing CE material with intent.	As above.

Vic	Crimes Act, s 68	Production of CP .	Depicts or describes a person under or who appears to be under 18 – (a) engaging in sexual activity, or (b) depicted in an indecent sexual manner or context.	Printing or producing CP .	10 years imprisonment.
Vic	Crimes Act, s 70	Possession of CP .	As above.	<i>Knowingly</i> possessing CP .	5 years imprisonment.
WA	Classification Act, s 60 (1)(a) and (b)	Selling or supplying CP ; or possessing CP with intent to sell or supply.	Depicts or describes person who is, or who looks like, a child under 16 – whether engaged in sexual activity or not - in a manner likely to cause offence to a reasonable adult.	Selling or supplying CP ; or possessing CP with intent to supply or sell ¹¹⁸ .	7 years imprisonment.
WA	Classification Act, s 60 (2)(3) and (4)	Publishing, displaying or possessing CP .	As above.	Publication, display or possession of CP .	5 years imprisonment.
ACT	Crimes Act, s 64A	Trading in CP .	Where child is person under 18, anything that represents – (a) sexual parts of child (b) child engaged in sexual activity; or (c) other person engaged in sexual activity in presence of child – and representation is substantially for sexual arousal/gratification of someone other than the child.	Production, Publication, offering or selling CP .	12 years imprisonment and/or fine.
ACT	Crimes Act, s 65	Possessing CP .	As above.	Intentionally possessing pornography which is CP .	5 years imprisonment and/or fine.
NT	Criminal Code Act, s 125B	Possession, distribution, production, selling Child Abuse (CA) material.	Depicts, describes or represents person under, or appears to be under 18 – (a) engaging in sexual activity; (b) in a sexual, offensive or demeaning context; or (c) being subjected to torture, cruelty or abuse.	Possession, distribution, production, selling Child Abuse (CA) material.	10 years imprisonment; fine for corporation.

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According to s 60 (5) there is a rebuttable presumption that possession or production of 10 or more copies is evidence that the person intended to sell the child pornography and, in the absence of evidence to the contrary, is proof of that fact.

5.8 State/Territory offences relating to using children for pornographic purposes

As set out in Table 3, all the State and Territory jurisdictions have offences relating to the use of children for pornographic purposes. Focusing on NSW, s 91G of the *NSW Crimes Act 1901*, distinguishes between using a child under 14 years and between 14 and 18 years, with the offences relating to the younger age group attracting a maximum penalty of 14 years (s 91G(1)), and offences against the older age group attracting a maximum penalty of 10 years.¹¹⁹ For both age groups, the offences have three separate limbs, that is, where the accused:

- uses a child for pornographic purposes; or
- causes or procures a child to be used for pornographic purposes; or
- having care of a child, consenting to it being so used or allowing it to be so used.¹²⁰

By s 91G(3) a child is used by a person for ‘pornographic purposes’ if:

- (a) the child is engaged in sexual activity; or
 - (b) the child is placed in a sexual context; or
 - (c) the child is subjected to torture, cruelty or physical abuse (whether or not in a sexual context),
- for the purposes of the production of pornographic material by that person.

Section 91G offences are sometimes categorised as ‘child prostitution offences’ and not as ‘child pornography offences’.¹²¹

The precise formulation of the relevant offence varies from one jurisdiction to another. For instance, under s 228A(2)(b) of the *Queensland Criminal Code Act 1899* express reference is made to the ‘attempt’ to involve a child in the making of child exploitation material. In *Victoria*, s 69 of the *Crimes Act 1958* is similar in terms to the comparable NSW provision, with the addition that an express defence is provided where the defendant can prove that the material in question would, if classified under the Commonwealth Classification Act, be ‘classified other than RC or X or X18+’. In other words, for the purposes of the defence the item could not be banned (RC) or classified in a category devoted to sexually explicit material (X or X18+). As set out in Table 3, under *Western Australia’s Criminal Code* the scale of offending varies depending (among other things) on the child’s age, with a statutory distinction being drawn between: (a) child victims under 13; (b) of or over 13 and under 16; and (c) of or over 16 years of age.

¹¹⁹ By s 91G(5), ‘Where on the trial of a person for an offence under subsection (1) the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under subsection (2), it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly’.

¹²⁰ By s 91G(4) ‘a person may have the care of a child without necessarily being entitled by law to have the custody of the child’.

¹²¹ But note that in the Judicial Commission’s *Sentencing Bench, Particular Offences – Child Sexual Assault* (para 17.540) s 91G is categorized as a child pornography offence.

Table 3 - Offences relating to use of children for pornographic purposes under State/Territory law

Jurisdiction	Statute /section	Category of offence	Subject/victim	Offence	Maximum penalty
NSW	Crimes Act, s 91G (1) and (2)	Using child for pornographic purposes.	Child under 14 (s 91G (1)); or child 14-17 years of age (s 91G(2)).	Uses a child, procures for use or consents to the child being used for pornographic purposes.	14 years imprisonment, where child under 14; 10 years imprisonment where child 14 or older.
Qld	Criminal Code, s 228A	Involving child in making child exploitation (CE) material.	Child under 16.	Involves or attempts to involve a child in making of CE material.	10 years imprisonment.
SA	Criminal Law Consolidation Act, s 63B	Procuring child to commit indecent act.	Child under, or apparently under, 16.	Inciting or procuring child to commit indecent act, or for a prurient purpose inducing child to expose any of his/her body, or records child in private act.	10 years imprisonment (12 years if child under 14 years).
Tas	Criminal Code Act, s 130	Involving child in production of CE material.	Person who is, or appears to be under 18.	Involves person under 18 in production of CE material and knows or ought to know nature of material.	No statutory maximum penalty.
Vic	Crimes Act, s 69	Procurement of minor for CP.	Minor – person who is or appears to be under 18.	Inviting, procuring, or causing a minor to be concerned in the making of CP, or offering a minor to be concerned in its making.	10 years imprisonment.
WA	Criminal Code, ss 320(6), 321(6) and 322(6).	Indecently recording child.	Child under 13 (s 320(6)), or child of or over 13 and under 16 (s 321(6)), or child of or over 16 (s 322(6)).	Indecently records child.	10 years imprisonment if victim under 13 (s 320(6)); 7 years if victim between 13 and 16, but 10 years if child under care of offender; 4 years if offender under 18 and victim not in his care (s 321(6)); 5 years if victim of or over 16 and under offender's care (322(6)).

ACT	Crimes Act, s 64	Using child for production of CP .	Child under 12 (s 64(1)(b)); child under 18 (s 64 (3)(b).	Uses, offers or procures child for production of CP , or for a pornographic performance.	15 years imprisonment and/or fine (under 12); 10 years and/or fine (under 18).
NT	Criminal Code Act, s 125E	Using child for production of child abuse (CA) material, or for pornographic or abusive performance.	Person under or appears to be under 18.	Uses, offers or procures person under, or appears to be under 18 for production of CA material or for pornographic or abusive performance.	14 years imprisonment; fine for corporation.

5.9 Other NSW provisions relevant to child pornography offences

Under NSW law child pornography offences are relevant to a wide range of other provisions. By s 11G of the *Summary Offences Act 1988* it is an offence for a convicted child sexual offender, which includes those convicted of child pornography offences, to loiter near schools or other public places frequented by children. The phrase ‘convicted child sexual offender’ also includes those convicted of child prostitution offences under s 91G. The maximum penalty is 2 years imprisonment and/or a fine of \$11,000.

For the purposes of the *Criminal Assets Recovery Act 1990*, s 91H(2) offences (child pornography production and dissemination offences) are declared to be ‘serious criminal offences’. This allows for the confiscation of property and the proceeds of crimes in certain circumstances. The same applies to s 91G offences. On the other hand, s 91H(3) – the possession offence – is not a ‘serious criminal offence’ for this purpose. Presumably, this is because the mere possession of child pornography does not as a rule give rise to criminal profits.

Under the *Criminal Procedure Act 1986*, by s 281B(1)(a) the definition of ‘sensitive evidence’ includes reference to ‘obscene or indecent’ images, an example of which is ‘a computer hard drive, held or seized by a prosecuting authority, containing images of child pornography’. One effect is that the accused can be denied access to such evidence. By s 281F of the same Act, the copying or circulation of such evidence is declared an offence. By s 348 of the same Act it is further stated that intervention programs, which focus on the treatment and rehabilitation of offenders, cannot be conducted in respect to child pornography offences. In these cases the focus of sentencing is on punishment.

As for the apprehension of offenders, s 47 of the *Law Enforcement (Powers and Responsibility) Act 2002* provides a specific power to police officers to apply for a search warrant for ‘a thing connected with a particular child pornography offence’.

Another arm of legal protection against those who have been convicted or are suspected of child pornography offences is provided under various employment related laws. Medical and related professions are required to declare any criminal proceedings pending against them concerning offences that ‘involve child pornography’ and to notify the relevant

professional body of any relevant convictions.¹²² A comparable regime operates under s 81K of the *Parliamentary Electorates and Elections Act 1912* by which candidates for election are required to make child-related conduct declarations. Express reference is made in this context to s 91G and s 91H offences, as it is to child sexual offences, committed in NSW or elsewhere, punishable by imprisonment for 12 months or more, ‘including a child pornography offence that is so punishable’. In other words, account is taken of offences committed in other jurisdictions.

Of further note is s 33B of the *Commission for Children and Young People Act 1998*, by which those convicted of s 91G and 91H offences are declared to be ‘prohibited persons’, which means they are prohibited from engaging in child related employment.

For the purposes of s 3A of the *Child Protection (Offenders Registration) Act 2000*, offences under ss 91G and 91H of the Crimes Act are defined to be ‘Class 2 offences’ (as are relevant provisions of the Commonwealth *Criminal Code* and s 233BAB of the Commonwealth *Customs Act 1901*).¹²³ These are ‘registrable offences’ under the legislation, the effect of which is to impose certain reporting restrictions on convicted persons and to place them on the Child Protection Register. Certain qualifications apply. For example, an offence committed by a child prostitute is not a registrable offence, for the reason that this would further victimise the child concerned.¹²⁴

Another long term impact on offenders is that s 91G and 91H offences are not capable of becoming spent in accordance with subsections 7(a) and (h) of the *Criminal Records Act 1991*.¹²⁵ In other words they remain, officially as in other ways, a permanent stain on the offender’s character and reputation. First and last, the focus is on the protection of children.

5.10 Comment

One issue for NSW law is whether maximum penalties for child pornography offences

¹²² *Chiropractors Act 2001*, ss 20 and 21; *Dental Practice Act 2001*, ss 36 and 37; *Medical Practice Act 1992*, ss 127A and 127B; *Nurses and Midwives Act 1991*, ss 42A and 42B; *Optometrists Act 2002*, ss 24 and 25; *Osteopaths Act 2001*, ss 20 and 21; *Pharmacy Practice Act 2006*, ss 31 and 32; *Physiotherapists Act 2001*, ss 21 and 22; and *Podiatrists Act 2003*, ss 20 and 21.

¹²³ Sections 474.19, 474.20, 474.22 and 474.23.

¹²⁴ *Child Protection (Offenders Registration) Act 2000*, s 3. Further exclusion relates to any child who committed a single offence in a foreign jurisdiction ‘of possessing or publishing child pornography (in whatever terms expressed)’ (s 3A(2)(c)(ii)). For adult offenders, reference is also made to the type of sentence imposed in respect to a single Class 2 offence – if the sentence did not include (i) a term of imprisonment, including a term of imprisonment the subject of a periodic detention order, home detention order or sentence suspension order, or an equivalent order under the laws of a foreign jurisdiction, or (ii) a requirement that the person be under the supervision of a supervising authority or any other person or body.

¹²⁵ Read with *Criminal Records Regulation 2004*, cl 17(1)(a).

should be raised, in particular for possession offences, which appear to be on the increase as access is gained through the Internet. Of course many, perhaps the majority, of these offences will be prosecuted under the Commonwealth Criminal Code. Another practical consideration is that most of the cases under NSW law are heard in the Local Court where the maximum term of imprisonment available is fixed at 2 years. There is an argument that, if penalties are to increase in real terms, it is at this level that amendments need to be introduced. These and other issues will be considered in the NSW Sentencing Council's review of sexual offences, the terms of reference for which include:

- Advise on the use and operation of statutory maximum penalties and standard minimum sentences when sentences are imposed for sexual offences and whether or not statutory maximum penalties and standard minimum sentences are set at appropriate levels.
- Consider the use of alternative sentence regimes incorporating community protection, such as the schemes used in Canada, the United Kingdom and New Zealand.¹²⁶

Does s 91H of the Crimes Act need to be revised in any more substantive way? A more detailed and particularised definition of child pornography material might be introduced, similar to that in place under the Commonwealth customs and criminal statutes. But whether this would assist the prosecution of relevant offences is doubtful. For the sake of clarity and certainty, consideration might be given to an express offence relating to the 'accessing' of child pornography material.

The other obvious issue is whether the subject or victim's age should be increased from 16 to 18. The broader question here is whether inconsistency across Australian jurisdictions in this, and possibly other respects, is a cause for actual concern. The case that the law should afford equal protection to minors across Australia is not without force.

¹²⁶

The Sentencing Council of NSW, *Media Release*, October 2007 at -
http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/pages/scouncil_news

6. CHILD PORNOGRAPHY SENTENCING STATISTICS

The following section of this Briefing Paper will examine selected sentencing statistics for child pornography offences. This statistical data was obtained from a range of sources, namely the Commonwealth Director of Public Prosecutions, the Judicial Commission of New South Wales, the Queensland Department of Justice and Attorney General, the Sentencing Advisory Council of Victoria and the South Australian Office of Crime Statistics and Research.

6.1 Using Statistical Data

Statistical data is a useful indicator of general trends in sentencing.¹²⁷ However, as highlighted by Spigelman CJ in *R v Bloomfield*, sentencing statistics have a number of limitations.¹²⁸ Most notably, the factors that influence judicial discretion are not always apparent through statistical data. Further, as stated by Sully J in *R v Shorten* in relation to statistics from the Judicial Commission of NSW:

I suspect, as of course is only elementary common sense, that statistics of that kind have a broad indicative value; but, for myself, I do not think that, at least in the generality of cases, they have any greater value. I think that the advent of the computer and of computerised statistics does not remove the need for sentencing Courts, primary or appellate, to look with discriminating care at the particular circumstances, objective and subjective, particulars to each individual case.¹²⁹

When analyzing statistical data for child pornography offences, one issue to note is that a sentence will generally only appear in statistical data if the child pornography offence is the 'principal offence'.¹³⁰ This means that if an offender is found guilty of a number of offences, the offence with the highest non-parole period is considered to be the principal offence. Accordingly, statistical data will generally not include cases where the child pornography offence is subordinate to a more serious offence.¹³¹

¹²⁷ Spigelman CJ, 'Consistency in Sentencing', Keynote address by the Honorable JJ Spigelman AC at Sentencing 2008 Conference, The National Judicial College of Australia, Canberra, 8 February 2008 at [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman080208.pdf/\\$file/spigelman080208.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman080208.pdf/$file/spigelman080208.pdf)

¹²⁸ [1998] 44 NSWLR 734 at [739].

¹²⁹ NSWCCA No 60059/97, cited in *DPP v Power*, Unreported Judgment, NSW District Court, 19 July 2007) at [129]. These comments related to statistics from the Judicial Commission of NSW, however may be applied generally in relation to statistical data.

¹³⁰ I Potas, The Use and Limitations of Sentencing Statistics, The Judicial Commission of NSW, *Sentencing Trends and Issues*, No 31, December 2004 at <https://sis.judcom.nsw.gov.au/publish/sentrends/st31/index.html>

¹³¹ Potas, n 130.

6.2 Commonwealth

6.2.1 *Criminal Code Act 1995 (Cth)*: The following statistics were sourced from the Commonwealth Director of Public Prosecutions and provide information about the types of sentences that have been received by offenders of child pornography offences under sections 474.19 to 474.23 *Criminal Code Act 1995 (Cth)*. These statistics indicate that during the last three financial years, 64 defendants were sentenced for child pornography offences under section 474.19 to 474.23 *Criminal Code Act 1995 (Cth)*, broken down as follows:

Period	Prison ¹³²	Bond	Community service order	Periodic Detention	Fine/Pecuniary Penalty ¹³³	Total
2005-2006	0	1	0	0	0	1
2006-2007	20	1	0	1	2	24
2007-2008	30	2	2	2	3	39
Total	50	4	2	3	5	64

The statistics indicate that the majority of the above offenders were sentenced under 474.19 *Criminal Code Act 1995 (Cth)* (using a carriage service for child pornography material). During the period 2007-2008, the most common length of imprisonment was between one and two years and during the period 2006-2007, the most common length of imprisonment was below one year. The majority of these offenders were dealt with on indictment by a District Court and the statistics indicate a trend towards imprisonment. The amounts of the fines ranged from \$1200 to \$5000 and the terms of periodic detention ranged from nine months to 12 months.¹³⁴

The above figures from the Commonwealth Director of Public Prosecutions can also be supplemented by the following statistics from the Commonwealth Sentencing Information System¹³⁵.

¹³² These statistics include 'suspended sentences'. During 2006-2007, seven out of 13 sentence of imprisonment for offences under s. 474.19 *Criminal Code Act 1995 (Cth)* were fully suspended. During 2007-2008, seven out of 23 sentences of imprisonment for offences under s. 474.19 *Criminal Code Act 1995 (Cth)* were fully suspended.

¹³³ 'Pecuniary Penalty' includes matters where the pecuniary penalty was a condition of the bond (payable upon default).

¹³⁴ This data was sourced from the Commonwealth Director of Public Prosecutions by email correspondence dated 5 August 2008, 8 August 2008 and 22 August 2008.

¹³⁵ This database is a joint project of the National Judicial College of Australia, the Commonwealth Director of Public Prosecutions and the Judicial Commission of Australia.

Section 474.19 *Criminal Code 1995* (Cth): Using a carriage service for child pornography material¹³⁶

During the period January 2003 to December 2007, ten offenders were sentenced on indictment under section 474.19 *Criminal Code Act 1995* (Cth). Four of these offenders received a fully suspended sentence and six of these offenders were sentenced to imprisonment ranging from 18 months to six years. Two offenders were sentenced summarily. One of these offenders received a sentence of imprisonment of 6 months. All of these offenders entered a guilty plea and were male.

Section 474.19(1)(a)(i) *Criminal Code 1995* (Cth): Using a carriage service to access child pornography material

During the period January 2003 to December 2007, eight offenders were sentenced on indictment for using a carriage service to access child pornography material under section 474.19(1)(a)(i) *Criminal Code Act 1995* (Cth). Three of these offenders received a fully suspended sentence and five of these offenders received a sentence of imprisonment. One offender was sentenced to a term of six months, three offenders were sentenced to a term of 24 months and one offender was sentenced to a term of 48 months. Seven offenders were dealt with summarily in a Local Court for this offence. Three of these offenders received a fully suspended sentence and one of these offenders received a sentence of periodic detention. Two offenders were sentenced to conditional release and one of the offenders received a fine in the amount of \$1250. All of these offenders entered a plea of guilty and were male.

Section 474(1)(a)(ii) *Criminal Code 1995* (Cth): Using a carriage service to cause child pornography material to be transmitted

During the period January 2003 to December 2007, one offender was sentenced on indictment to 24 months imprisonment under section 474.19(1)(a)(ii) *Criminal Code Act 1995* (Cth) (using a carriage service to have child pornography material transmitted).

Section 474(1)(a)(iii) *Criminal Code 1995* (Cth): Using a carriage service to transmit child pornography material

One offender was sentenced on indictment under section 474.19(1)(a)(iii) *Criminal Code Act 1995* (Cth) and received a fully suspended sentence.

Section 474(1)(a)(iv) *Criminal Code 1995* (Cth): Using a carriage service to make child pornography material available

Three offenders were sentenced to imprisonment under section 474.19(1)(a)(iv) *Criminal Code Act 1995* (Cth) for the period January 2003 to December 2007. Two of these offenders were sentenced to imprisonment for a period of 12 months and one offender was

¹³⁶

These statistics refer to offences under s. 474.19 *Criminal Code Act 1995* (Cth) where the offence has not been categorized according to a particular subsection.

sentenced to imprisonment for a period of 36 months. During the period January 2003 to December 2007, one offender was sentenced summarily to conditional release. All of these offenders were male and entered a plea of guilty.

Section 474.20 *Criminal Code Act 1995* (Cth): Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service¹³⁷

During the period January 2003 to December 2007, one offender was sentenced on indictment under section 474.20 *Criminal Code Act 1995* (Cth) for possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service. This offender received a fully suspended sentence.

Section 474.20(1) *Criminal Code Act 1995* (Cth): Possessing material with an intention to breach section 474.19 *Criminal Code Act 1995* (Cth)

One person was sentenced on indictment to imprisonment for a period of 24 months for an offence under section 474.20(1) *Criminal Code Act 1995* (Cth) (possessing material with an intention to breach section 474.19 *Criminal Code Act 1995* (Cth)).

Section 474.22(1)(a)(iii) *Criminal Code Act 1995* (Cth): Using a carriage service to transmit child abuse material¹³⁸

Finally, one person was sentenced on indictment to imprisonment for a period of 18 months for the offence under section 474.22(1)(a)(iii) *Criminal Code Act 1995* (Cth).

6.2.2 *Customs Act 1901* (Cth): The following table shows statistical data provided from the Commonwealth Director of Public Prosecutions regarding the number of sentences imposed for importation of child pornography or child abuse material under section 233BAB(5) *Customs Act 1901* (Cth):¹³⁹

Period	Prison	Fine	Bond	Total
2003-2004	1	2	0	3
2004-2005	3	2	0	5
2005-2006	1	1	1	3
2006-2007	5	2	1	8
2007-2008	7	0	2	9
Total	17	7	4	28

¹³⁷ These statistics refer to offences under s. 474.20 *Criminal Code Act 1995* (Cth) where the offence has not been categorized according to a particular subsection.

¹³⁸ The database names this section 'use carriage service to make child abuse material available'.

¹³⁹ This data was sourced from the Commonwealth Director of Public Prosecutions by email correspondence dated 5 August 2008.

6.2.3 Open child pornography prosecutions: The Commonwealth Director of Public Prosecutions has indicated that there are 138 open child pornography matters:

- 135 matters were referred to the Commonwealth Director of Public Prosecutions under section 474.19 *Criminal Code Act 1995* (Cth) (Using a carriage service for child pornography material);
- two matters were referred to the Commonwealth Director of Public Prosecutions under section 474.20 *Criminal Code Act 1995* (Cth) (Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service); and
- one matter was referred to the Commonwealth Director of Public Prosecutions under section 474.22 *Criminal Code Act 1995* (Cth) (Using a carriage service for child abuse material).¹⁴⁰

6.3 New South Wales

The Judicial Commission of New South Wales provides the Sentencing Information System, a sentencing database, which publishes sentencing statistics for offences under NSW legislation.¹⁴¹ The statistical data only includes child pornography offences when they are the principal offence and divides the data into offenders dealt with by a Lower (Local) or Higher (District) Court.¹⁴² The following reported data covers child pornography offences under sections 91H(2) and 91H(3) *Crimes Act 1900* (NSW) for the period January 2005 and December 2007.

6.3.1 Section 91H(2) *Crimes Act 1900* (NSW) (Local Court): Production or dissemination of child pornography, Jan 2005 - Dec 2007¹⁴³

Penalty Type	Number of Offenders	Percentage of Offenders
s. 9 Bond	1	11%
s. 9 Bond with supervision	1	11%
Suspended sentence	1	11%
Suspended sentence with supervision	4	44%
Prison	2	22%
Total	9	100%

¹⁴⁰ This data was sourced from the Commonwealth Director of Public Prosecutions by email correspondence dated 8 August 2008.

¹⁴¹ <http://www.jc.nsw.gov.au>. The statistics are retrieved from court records and 'BOSCAR'.

¹⁴² Pursuant to section 260 *Criminal Procedure Act 1986* (NSW), the prosecution or the accused can elect to have less serious child pornography offences dealt with by a Local Court rather than the District Court, in which case the maximum penalty will be lower.

¹⁴³ This data is from the Judicial Commission of NSW's 'Sentencing Information System'.

All of the nine offenders who were sentenced under section 91H (2) *Crimes Act 1900* (NSW) entered a plea of guilty and five of the offenders had no prior criminal record. Four of the offenders were over the age of 50 years old, two of the offenders were aged between 41 to 50 years old, two were 31 to 40 years old and one offender was aged 18 to 20 years old. Out of the two offenders who were sentenced to imprisonment, one of the imprisonment terms was 18 months and the other was 24 months (with a non-parole period of 9 months and 18 months respectively). The terms of the bonds were 36 months.

6.3.2 Section 91H(3) *Crimes Act 1900* (NSW) (Local Court): Possession of child pornography, Jan 2005 - December 2007

Penalty Type	Number of Offenders	Percentage of Offenders
Fine only	3	3%
s. 9 Bond	6	7%
s. 9 Bond with supervision	8	9%
Community service order	9	10%
Suspended sentence	4	5%
Suspended sentence with supervision	17	19%
Periodic Detention	5	6%
Prison	36	41%
Total	88	100%

The data indicates that 77 offenders entered a plea of guilty. Sixty-five of the offenders had no prior criminal record. Four offenders were aged between 18 and 20 years old; four offenders were aged between 21 and 25 years old; 18 of the offenders were aged between 26 and 30 years old; 19 of the offenders were aged between 31 and 40 years old; 23 of the offenders were aged between 41 and 50 years old and 20 offenders were aged over 50 year old. Eleven of the 36 offenders who were sentenced to imprisonment received a sentence of 12 months. Five offenders received a sentence of imprisonment for a period of 9 months and five offenders received a sentence of imprisonment for 24 months. Three offenders were ordered to pay a fine of \$2000.

The two offenders who were sentenced under section 91H(2) and 91H(3) *Crimes Act 1900* (NSW) were sentenced in a Higher Court (District Court). One offender sentenced under section 91H(2) *Crimes Act 1900* (NSW) received a bond with supervision for a period of 36 months and the other offender sentenced under section 91H(3) *Crimes Act 1900* (NSW) received a bond with supervision for a period of 24 months. Accordingly, the statistical data indicates that the majority of offenders sentenced for child pornography offences are dealt with by a Local Court, where the maximum penalty is lower.¹⁴⁴

¹⁴⁴

Pursuant to section 267 *Criminal Procedure Act 1986* (NSW), the maximum sentence is 2 years imprisonment (section 91H is a 'Schedule 1' offence under the *Criminal Procedure Act 1986* (NSW)).

6.3.3 Section 91G *Crimes Act 1900* (NSW): Using a child for pornographic purposes (District Court) (Oct 2000 - Sept 2007)

In the same time period, three offenders were reportedly sentenced under s. 91G(1) *Crimes Act 1900* (NSW) for using a child under 14 years old for pornographic purposes.¹⁴⁵ All of these offenders were sentenced by the District Court to imprisonment. The terms of imprisonment were 24 months, 30 months and 36 months imprisonment. One offender was sentenced for a principal offence under section 91G(2) *Crimes Act 1900* (NSW) for using a child above the age of 14 years old for pornographic purposes and was sentenced to imprisonment for 48 months.

6.4 Queensland

The following data was sourced from the Queensland Wide Interlinked Courts System and provides the number of defendants proven guilty in Queensland Courts for child pornography offences.¹⁴⁶

Orders imposed	2005-2006¹⁴⁷	2006-2007	2007-2008	Total
Imprisonment orders	17	34	37	88
Intensive correction orders	4	4	10	18
Wholly suspended sentence	9	17	26	52
Community service orders	6	7	3	16
Probation orders	5	8	14	27
Monetary orders	19	13	13	45
Recognisance orders	0	2	0	2
Other	0	0	2	2
Total	60	85	105	250

The following table shows the number of charges proven guilty in all Queensland Courts for child pornography offences:

¹⁴⁵ These statistics were for the period October 2000 to September 2007.

¹⁴⁶ This data sourced from the Queensland Department of Justice and Attorney General by email communication dated 19 August 2008. Where a defendant has multiple charges, only the principal offence is included in the tables. The offence of procuring a child for pornography is not included in these tables.

¹⁴⁷ The offences of making, distributing and possessing child exploitation material pursuant to *Criminal Code 1899* (Qld) came into force in 2005. Accordingly, any comparative analysis of the 2005-2006 data for the later reference periods will incorrectly show an increase in the number of defendants.

Orders imposed	2005-2006¹⁴⁸	2006-2007	2007-2008	Total
Imprisonment orders	29	86	175	290
Intensive correction orders	7	14	14	35
Wholly suspended sentence	37	128	49	214
Community service orders	35	13	9	57
Probation orders	87	13	25	125
Monetary orders	52	34	17	103
Recognisance orders	0	2	0	2
Other	0	0	4	4
Total	247	290	293	830

6.5 Victoria

The Sentencing Advisory Council of Victoria recently released a ‘Sentencing Snapshot’, which provided the sentencing outcomes for the principal offence of ‘knowingly possessing child pornography’ for the periods 2004-05 and 2006-07.¹⁴⁹ The maximum sentence for the offence of knowingly possess child pornography under section 70(1) of the *Crimes Act 1958* (Vic) is five years imprisonment and/or a fine of 600 penalty units. When the offence is heard summarily before the Magistrate’s Court, the maximum penalty is two years imprisonment and/or a fine of 240 penalty units. According to the Sentencing Advisory Council, ‘less than half of the people sentenced for knowingly possess child pornography received a non-custodial sentence (45.7%), including 28% who received a community-based order. 15% were sentenced to imprisonment, 20% received a wholly suspended sentence and 10% received an intensive correction order’.¹⁵⁰

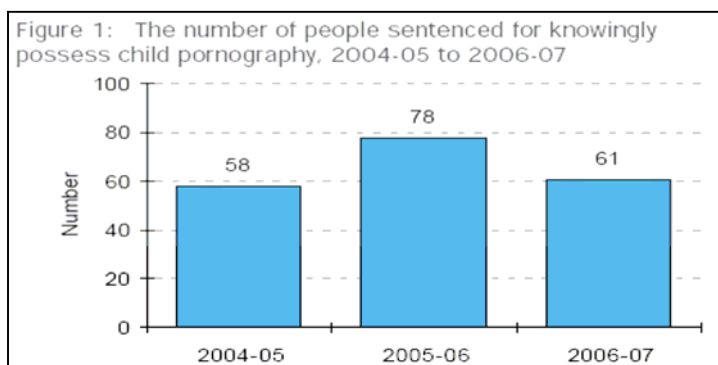
The ‘Sentencing Snapshot’ indicates that 95.2% of offenders were dealt with summarily during the periods 2004-2005 and 2006-2007. Over the three-year period between 2004 and 2007, 197 people were sentenced for the principal offence of ‘knowingly possess child pornography’ in the Victorian Magistrate’s Court. All of the 197 people who were sentenced during the three-year period were male, their ages ranged from 18 years to 78 years and the median age was 39 years old. The following table was extracted from the ‘Sentencing Snapshot’ and provides the number of people who were sentenced for the

¹⁴⁸ See n. 146.

¹⁴⁹ Sentencing Advisory Council of Victoria, *Sentencing Snapshot*, No 51, June 2008 at http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file/ebbc70d6b489c3/Knowingly_Possess_Child_Pornography_MagsCourt_2008.pdf

¹⁵⁰ Sentencing Advisory Council of Victoria, ‘New Snapshots on Magistrate’s Court Sentencing’, Media Release, 30 June 2008 at <http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/Home/Media/News+Archive/SENTENCING+-+New+Snapshots+on+Magistrates%27+Court+Sentencing>

principal offence of knowingly possess child pornography between 2004 -2005 and 2006 - 2007:¹⁵¹



The following table shows the number and percentage of the sentences for the offences of 'knowingly possess child pornography' between 2004 and 2007:

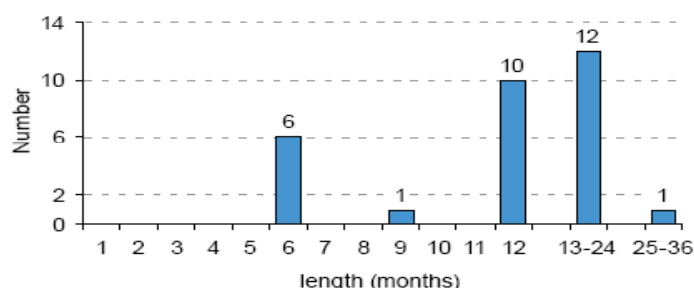
Sentence Type	Total	Percentage
Immediate custodial	47	23.9%
Imprisonment	30	15.2%
Partially Suspended Sentence	17	8.6%
Other custodial	60	30.5%
Wholly suspended sentence	40	20.3%
Intensive correction order	20	10.2%
Non Custodial	90	45.7%
Community based order	56	28.4%
Fine	18	9.1%
Adjourned undertaking	16	8.1%
Total People sentenced	197	100.0%

During the period 2006-2007, five people were sentenced to imprisonment for the principal offence of 'knowingly possess child pornography'. During the period 2005-2006, 18 people were sentenced to imprisonment and during the period 2004-2005, seven people were sentenced to imprisonment. The majority of offenders who were sentenced to imprisonment were aged between 35 and 39 years old. The lengths of imprisonment ranged from six months to two years and the median length of imprisonment was one year. The following table sets out the length of imprisonment for the period 2004-2007:¹⁵²

¹⁵¹ Sentencing Advisory Council of Victoria, n 149.

¹⁵² Sentencing Advisory Council of Victoria, n 149.

Figure 12: The number of people who were sentenced to imprisonment for knowingly possess child pornography by the length of order, 2004-05 to 2006-07



6.6 South Australia

Between 30 January 2005 and 31 December 2007 55 cases were finalized by the South Australian Courts for offences under sections 63 or 63A of the *Criminal Law Consolidation Act 1935* (SA).¹⁵³ Section 63 of the *Criminal Law Consolidation Act 1935* (SA) makes it an offence to produce or disseminate child pornography and section 63A of the *Criminal Law Consolidation Act 1935* (SA) makes it an offence to possess child pornography.

Between 30 January 2005 to 31 December 2007, 38 cases were sentenced in the Magistrate's Court for the above offences, 16 were sentenced in the District Court and one case was dealt with in the Supreme Court. Whilst the majority of these cases only had one child pornography offence, the highest number of child pornography offences in one case was 19. The following table shows the number of offences dealt with under sections 63 and 63A *Criminal Law Consolidation Act 1935* (SA) between 30 January 2005 and 31 December 2007:

Child pornography offences finalized by the Courts: by type (30 Jan 2005 - 31 Dec 2007)

Type of offence	Number	Percentage
s. 63(a) Produce child pornography	61	52.6%
s. 63(b) Disseminate child pornography	5	4.3%
s. 63A(1)(a) Possess child pornography	47	40.5%
s. 63A(1)(b) Obtain child pornography	3	2.6%
Total	116	100%

¹⁵³

This data was sourced from the Office of Crime Statistics and Research by email communication dated 1 August 2008. The 55 cases exclude cases finalized by committal to a higher court for trial or sentence.

The table above indicates that the most commonly recorded type of child pornography offence was produce child pornography under section 63(a) *Criminal Law Consolidation Act 1935* (SA), followed by possess child pornography under section 63A(1)(a) *Criminal Law Consolidation Act 1935* (SA).

In just under half (26) of the 55 cases finalized by the South Australian Courts, the defendant was found guilty of at least one child pornography offence under sections 63 or 63A *Criminal Law Consolidation Act 1935* (SA). The following table shows the outcome for each of the 116 child pornography offences in the 55 cases. As shown, of the 116 child pornography offences finalized by 31 December 2007, 35 had a finding of guilt recorded (with or without a conviction), while the other 81 were withdrawn, dismissed or had an outcome of 'nolle prosequi'.

Outcome	s. 63(a)	s. 63(b)	s. 63A(1)(a)	s. 63A(1)(b)	Total
Convicted	8	1	18	0	27
Guilty – no conviction recorded	0	1	4	3	8
Charge withdrawn	3	2	3	0	8
Dismissed for want of prosecution	50	0	22	0	72
Nolle prosequi	0	1	0	0	1
Total	61	5	47	3	116

The following table indicates the penalties imposed when the defendant was found guilty of at least one child pornography offence. In 17 of these cases, the child pornography offence was the principal offence and in the other nine cases, the other principal offence was most often a sexual offence or indecent assault. The penalties imposed in the 17 cases, where the principal offence was a child pornography offence under the *Criminal Law Consolidation Act 1935* (SA) are set out below:

Penalties for child pornography offences (30 Jan 2005 - 31 Dec 2007)

Penalty	s. 63(a)	s. 63(b)	s. 63A(1)(a)	s. 63A(1)(b)	Total
Fine	0	0	3	0	3
Bond without supervision	0	1	2	1	4
Bond with supervision	0	0	1	0	1
Suspended imprisonment	1	0	3	0	4
Imprisonment/detention	1	0	4	0	5
Total	2	1	13	1	17

The terms of the sentence of imprisonment ranged from four to 30 months. When the penalty imposed was a suspended sentence, the term of sentence ranged from four to nine months. The period of the bonds ranged from 18 months to two years. Finally, in the cases where the fine was imposed, the amounts ranged from \$200 to \$2000.

6.7 Comment

The statistics indicate that those who commit child pornography offences are overwhelmingly male and the majority of offenders plead guilty.¹⁵⁴ The average length of imprisonment for NSW child pornography offences is 12 months. The average length of the sentences for Commonwealth child pornography offences in 2007-2008 is higher than the previous year, rising from under one year to one to two years, which may indicate a trend towards harsher sentences for child pornography offences.

¹⁵⁴

M Clayfield, 'Woman jailed for "horrific" child porn', *The Australian*, 16 August 2008, p 3: 'The NSW Bureau of Crime Statistics and Research could find no record of any females being convicted for possessing or disseminating child pornography between 1994 and 2006'. However, note *R v MAB* [2007] NSWDC 83, discussed later in this paper.

7. CHILD PORNOGRAPHY CASE LAW

We are dealing with a medium where communication is so quick and so broad that something like this could happen. It is stunning that millions of people around the world can commit an offence and access child abuse images in one hit, at the same time.¹⁵⁵

Assistant Commissioner Andrew Colvin, Australian Federal Police

This section of the Briefing Paper will examine how the courts have applied child pornography case law in recent years, focusing on NSW case law.

7.1 Concerns about the inadequacy of sentences

As mentioned earlier in this paper, there have been a number of reports in the media about the perceived leniency of sentences for child pornography offences.¹⁵⁶ One notable example is the case of *R v Nigel Keith Saddler*¹⁵⁷, where Judge Berman commented on the inadequacy of the maximum penalty for child pornography offences under section 91H(3) *Crimes Act 1900* (NSW).

R v Saddler¹⁵⁸

Saddler is a 35 year old man who pleaded guilty to three counts of possessing child pornography under section 91H(3) *Crimes Act 1900* (NSW). The three charges covered 35,508 still images, 687 movie files and 77 archived photos, each charge relating to a different location where the items were found.¹⁵⁹ The child pornography items showed the abuse of thousands of children and many were in the most serious category of the 'COPINE' scale.¹⁶⁰ One of the series of images depicted a female baby with a caption below that read 'baby getting tortured'.¹⁶¹

On 18 April 2008, Judge Berman of the District Court of NSW sentenced Saddler to imprisonment for three years six months, with a head sentence of five years imprisonment on the first charge.¹⁶² On the second and third charges, the offender was sentenced to a

¹⁵⁵ Allard, n 36.

¹⁵⁶ Klan & McKenna, n 37.

¹⁵⁷ [2008] NSWDC 48.

¹⁵⁸ *R v Saddler* [2008] NSWDC 48.

¹⁵⁹ There were also two further child pornography offences on a 'Form 1'.

¹⁶⁰ *R v Saddler* [2008] NSWDC 48 at [5].

¹⁶¹ These images related to an offence on the 'Form 1'. See *R v Saddler* [2008] NSWDC 48 at [3].

¹⁶² Judge Berman also took into account the two offences on the 'Form 1'.

non-parole period of two years and a head sentence of three years and nine months imprisonment. The overall sentence was six years imprisonment, with a non-parole period of four years and six months.

When sentencing Saddler, Judge Berman made a number of comments about the serious nature of child pornography offences and the need for harsh sentences for these offences ‘not only so that judges do what they can to reduce the demand for such appalling acts of cruelty, but also to mark in a very real way the community’s horror at such treatment of entirely innocent and defenceless children’.¹⁶³ Judge Berman continued to say:

Of course the consequences of possession of child pornography go beyond the harm caused to those children involved in its production. The use by an offender of child pornography has the effect of weakening the otherwise very strong idea that children need to be protected from sexual exploitation. Further the use by a person of child pornography for sexual gratification can lead to a situation where the person himself moves beyond being merely a viewer of child pornography to become an abuser of children.¹⁶⁴

Judge Berman also referred with approval to the comments of Kennedy J in *R v Jones*:¹⁶⁵

The production of child pornography for dissemination involves the exploitation and corruption of children who are incapable of protecting themselves. The collection of such material is likely to encourage those who are actively involved in corrupting the children involved in the sexual activities depicted and who recruit and use those children for the purpose of recording and distributing the results. The offence of possessing child pornography cannot be characterised as a victimless crime. The children, in the end, are the victims.¹⁶⁶

After discussing the nature of child pornography offences, Judge Berman commented on the inadequacy of the maximum penalty for the offence of possession of child pornography under section 91H(3) *Crimes Act 1900* (NSW). As already mentioned Saddler was charged with three counts of possessing child pornography, each relating to a different location where the items of child pornography were found.¹⁶⁷ Judge Berman commented that the three charges covered ‘an enormous number of separate items of child pornography’¹⁶⁸ and that:

it must be remembered that those who are sentenced for committing sexual acts

¹⁶³ *R v Saddler* [2008] NSWDC 48 at [4].

¹⁶⁴ *R v Saddler* [2008] NSWDC 48 at [50].

¹⁶⁵ (1999) 108 A Crim R 50. Cited in *R v Saddler* [2008] NSWDC 48 at [47].

¹⁶⁶ *R v Saddler* [2008] NSWDC 48 at [47]. These comments were also cited in *R v Assheton* (2002) 132 A Crim R 23.

¹⁶⁷ *R v Saddler* [2008] NSWDC 48 at [11].

¹⁶⁸ *R v Saddler* [2008] NSWDC 48 at [51].

upon children, some notorious cases aside, have usually been involved in the harm of a small number of children, in many cases only one. But people like this offender have been involved in the harm of enormous numbers, indeed “*thousands*” of children. So if one was to look only at the extent of harm caused by criminal activity it may well be that the maximum penalty of five years imprisonment where a charge relates to thousands of items of child pornography (and a commensurate number of victims) is inadequate.¹⁶⁹

Despite these concerns, Judge Berman then commented that this ‘is not a matter which can influence me in my determination of the appropriate sentences for these matters. It is not for me to overcome what I consider to be the inadequacy of the maximum penalty by failing to apply proper sentencing principles’.¹⁷⁰ After considering the serious nature of Saddler’s offences, Judge Berman went on to consider the subjective features of the offender, such as Saddler’s guilty plea.¹⁷¹

In the context of considering the principle of accumulation, Judge Berman commented that:

Advances in storage capacity mean that an offender can now store on a single hard drive or burn to a single CD or DVD many more items of child pornography than was previously possible. A conclusion that an offender should be able to take advantage of these technological advances by facing only one charge, no matter how many images are stored in a particular location is not an attractive one.¹⁷²

Judge Berman said that he did not think that it would be appropriate to lay thousands of charges, one relating to each item of child pornography. However, he suggested that if child pornography items were all found in one location, these items could be grouped according to categories. For example, ‘items could be grouped according to when they were downloaded, whether they were still images or moving pictures, the nature of the sexual activity depicted’.¹⁷³

7.2 General deterrence

Case law indicates that general deterrence must be of paramount consideration when sentencing offenders for child pornography offences, given the prevalence and availability of child pornography (particularly on the Internet).¹⁷⁴

¹⁶⁹ *R v Saddler* [2008] NSWDC 48 at [52].

¹⁷⁰ *R v Saddler* [2008] NSWDC 48 at [51].

¹⁷¹ *R v Saddler* [2008] NSWDC 48 at [86].

¹⁷² *R v Saddler* [2008] NSWDC 48 at [90].

¹⁷³ *R v Saddler* [2008] NSWDC 48 at [90].

¹⁷⁴ See, for example *R v Assheton* (2002) 132 A Crim R 237.

Power v DPP¹⁷⁵

Power entered a plea of guilty to a charge of possession of child pornography under s. 91H(3) *Crimes Act 1900* (NSW). At the time of the offence, Power was Deputy Senior Crown Prosecutor at the NSW Department of Public Prosecutions. On 3 July 2006, Power rang a computer systems analyst in the Information, Management and Technology Branch of the NSW Department of Public Prosecutions and asked for advice regarding his computer. Power subsequently brought his computer into the office. During the back up process the next day, the computer analyst noticed files of a sexual nature. On 5 July 2006, the police executed two search warrants and seized items including Power's home computer. During the afternoon of 6 July 2006, Power was arrested at his home for possession of child pornography.

A folder with 31 video files of child pornography and a database with 28,981 thumbnail images of a pornographic nature, including 433 child pornography images were located on the hard drive in Power's computer. A novel entitled "The White Glove" describing acts between males under the age of 16 years old was also found on the computer. There were other items of child pornography, including bookmarks of Internet sites and diskettes with graphic images files of child pornography. The Chief Magistrate sentenced Power to 15 months imprisonment with a non-parole period at 8 months.¹⁷⁶ On appeal, Acting Judge Boulton of the District Court reduced the non-parole period to 6 months.

In *Power v DPP*¹⁷⁷ the following comments of the Ontario Court of Appeal in *R v Stroempl* were quoted with approval:

The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense, possessors such as the appellant instigate the production and distribution of child pornography – and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of the prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.¹⁷⁸

¹⁷⁵ *Power v DPP*, unreported DC (NSW) 19 July 2007. See also *Police v Power* [2007] NSWLC 1.

¹⁷⁶ *Police v Power* [2007] NSWLC 1 at [96].

¹⁷⁷ *Power v DPP*, unreported DC (NSW) 19 July 2007 at [126].

¹⁷⁸ (1995) 105 CCC (3d) 187 at [191]. This case was also cited in cases such as *R v Saddler* [2008] NSWDC 48 at [49], *R v Gent* [2005] NSWCCA 370 at [43] and *R v Jones* *R v Jones* (1999) 108 A Crim R 50 at [51].

In the case of *Power v DPP*, Acting Judge Boulton commented that that ‘general deterrence is not just significant but a paramount consideration’ when sentencing offenders for child pornography offences.¹⁷⁹ He also cited the judgment of McHugh J in *Ryan v R*¹⁸⁰ and stated:

The effect to be given to good character is overshadowed in cases of this kind by the need for general and specific deterrence. The offence is serious and attracts stern condemnation from the legislature and community at large...the appellant’s prior good character, whilst impressive in many respects, must yield to considerations of general deterrence.¹⁸¹

In *R v Gent*¹⁸², a Commonwealth case under the *Customs Act 1901* (Cth), the NSW Court of Criminal Appeal also cited the comments of Malcolm CJ (Murray and Steytler JJ agreeing) in *R v Assheton*¹⁸³ in relation to the issue of general deterrence, where the Western Australian Court of Criminal Appeal stated:

It is apparent that the maximum penalty for an offence contrary to s233BAB (5) of the Customs Act reflects the seriousness of the offence. The offence is of a nature that, in the context of sentencing, general deterrence must be the paramount consideration given the prevalence and availability of child pornography, particularly on the Internet.¹⁸⁴

7.3 Approach to good character

A number of cases have addressed the relevance of prior good character when sentencing offenders for child pornography offences. As already mentioned, one notable case is *R v Gent*¹⁸⁵, which was cited by the court in *Power v DPP*.¹⁸⁶

¹⁷⁹ *Power v DPP*, unreported DC (NSW) 19 July 2007 at [86].

¹⁸⁰ (2001) 206 CLR 267.

¹⁸¹ *Power v DPP*, unreported DC (NSW) 19 July 2007 at [113 - 115].

¹⁸² [2005] NSWCCA 370.

¹⁸³ (2002) 132 A Crim R 237 at [35].

¹⁸⁴ Cited in *R v Gent* [2005] NSWCCA 370 at [33].

¹⁸⁵ [2005] NSWCCA 370.

¹⁸⁶ *Power v DPP*, unreported DC (NSW) 19 July 2007 at [128].

R v Gent¹⁸⁷

Gent was charged with offences of importation of child pornography under s. 233BAB(5) *Customs Act 1901* (Cth).¹⁸⁸ On 9 July 2003, Gent (a 39 year old male) was found in possession of child pornography material when re-entering Australia at Kingsford Smith Airport after returning from an overseas teaching position. A search of Gent's bag by Customs Officers revealed a number of CDs, computer floppy disks and a DVD.¹⁸⁹ One of the CDs was found to depict 16 video images of young boys engaged in sexual acts with adult males or each other and a further CD contained 601 still photograph images of young boys and girls engaged in sexual acts with each other and/or adult males and females.¹⁹⁰ The sentencing judge stated that many of the victims 'have been targeted for predation by men and women, but predominantly by men. Many of the children look thin and emaciated, probable victims of war-torn areas of Europe or elsewhere, probably without parents or anyone who might be interested in caring for them'.¹⁹¹ The District Court of NSW imposed a sentence of 18 months imprisonment with a 12-month non-parole period, accompanied by a recognisance release order that Gent be released after 12 months subject to the supervision, guidance and direction of the Probation and Parole Service. On appeal, the NSW Court of Criminal Appeal found that the sentencing judge did not err in giving limited weight to Gent's prior good character.

On appeal, the issue of prior good character was raised. The trial judge had stated that prior good character 'whilst relevant, is not of primary relevance in a similar way to which lack of previous convictions has been regarded in sexual assault and drug cases'.¹⁹² The appellant argued that the trial judge erred when he gave limited value to prior good character.¹⁹³ Johnson J, in the NSW Court of Criminal Appeal considered the UK case of *R v Oliver*¹⁹⁴, where Rose LJ stated 'as far as mitigation is concerned, we agree with the

¹⁸⁷ *R v Gent* [2005] NSWCCA 370.

¹⁸⁸ This case was heard prior to the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth). As stated in *R v Gent* [2005] NSWCCA 370 at [32]: 'Section 233BAB(3) was amended by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth) with effect from 1 March 2005, to provide for a more elaborate particularisation of material as child pornography. Although those amendments do not apply to the present case, they reflect the increasing application of the criminal law to pornographic material accessed via the Internet.'

¹⁸⁹ *R v Gent* [2005] NSWCCA 370 at [5 - 6].

¹⁹⁰ *R v Gent* [2005] NSWCCA 370 at [8 - 9].

¹⁹¹ The relevant comments of Williams DCJ were cited in *R v Gent* [2005] NSWCCA 370 at [11].

¹⁹² *R v Gent* [2005] NSWCCA 370 at [45].

¹⁹³ *R v Gent* [2005] NSWCCA 370 at [44].

¹⁹⁴ *R v Oliver* [2003] 1 Cr App R 28.

Panel that some, but not much, weight should be attached to good character.’¹⁹⁵ Johnson J observed:

There is a foundation for the approach that less weight should be attached to evidence of prior good character on sentence for offences of importing child pornography. It appears that such offences are committed frequently by persons of otherwise good character. General deterrence has been referred to as the “*paramount consideration*” on sentence for this class of offence (*Assheton*). The fact that the offence is, in a sense, committed in secret is also relevant to this issue.¹⁹⁶

Johnson J continued:

...the public interest in stifling the possession and use of such material as a means of protecting children has been advanced to emphasise the significance of general deterrence on sentence. It cannot be said that the existence of good character places this class of offender in a position where they are more able to commit an offence (as with a white-collar offender) or more likely to be selected to commit an offence (as with a drug courier). It appears that pornographic material is available generally on the Internet to any person who is minded to access it, irrespective of the good character or otherwise of the person. Indeed, the ready availability of the material is a further factor pointing to the significance of general deterrence on sentence.¹⁹⁷

Further, Johnson J stated:

I am not satisfied that error has been demonstrated on the part of the learned sentencing Judge in approaching evidence of the Applicant’s lack of previous convictions as being “*not of primary relevance*”. Although his Honour’s reliance, by analogy, on the use of good character in sentencing for offences of sexual assault and drug cases may not have been apt, the circumstances here justified his Honour’s assessment of the significance of this Applicant’s prior, but qualified, good character.¹⁹⁸

In the recent case of *Mouscas v R*¹⁹⁹, the NSW Court of Criminal Appeal considered the remarks of Johnson J in *R v Gent*²⁰⁰. In this case, the applicant argued that the sentencing

¹⁹⁵ Cited in *R v Gent* [2005] NSWCCA 370 at [62].

¹⁹⁶ *R v Gent* [2005] NSWCCA 370 at [64].

¹⁹⁷ *R v Gent* [2005] NSWCCA 370 at [65 - 66].

¹⁹⁸ *R v Gent* [2005] NSWCCA 370 at [68].

¹⁹⁹ [2008] NSSWCCA 181.

²⁰⁰ [2008] NSSWCCA 181 at [33 - 36].

judge did not give enough weight to the applicant's prior good character.²⁰¹ However, the NSW Court of Criminal Appeal rejected this argument and commented that for 'the offence of possession of child pornography where general deterrence is necessarily of importance and is frequently committed by persons of prior good character, it is legitimate for a court to give less weight to prior good character as a mitigating factor'.²⁰²

7.3.1 Objective Seriousness of Child Pornography Offences

In *R v Gent*,²⁰³ Johnson J also made comments about a number of factors, which are relevant to the objective seriousness of an offence of possession of importation child pornography. These factors include:

- the nature and content of the pornographic material – including the age of the children and the gravity of the sexual activity portrayed;
- the number of images or items of material possessed by the offender;
- whether the possession or importation is for the purpose of sale or further distribution; and
- whether the offender will profit from the offence.²⁰⁴

He continued to state that:

...the number of images as such may not be the real point. In a case of possession of child pornography for personal use only, the significance of quantity lies more in the number of different children who are depicted and thereby victimised.²⁰⁵

7.4 Aggravating and Mitigating Factors

R v MAB²⁰⁶

At the time of the offences, MAB was 38 years old and the mother of the two children ('TB' and 'KB'). In November 2005, NSW police received a computer disk from Queensland police with a number of images of children being subjected to sexual assault. The police attended the offender's home with a search warrant and later attended a motel where they found the offender, her children and GEB and seized a digital camera and six vibrators. During a subsequent interview, KB disclosed that the offender had taken sexual photographs of herself and TB.

²⁰¹ The applicant referred to the ACT case of *R v Fowler* [2007] ACTCA 4.

²⁰² *Mouscas v R* (2008) NSWCCA 181 at [37].

²⁰³ [2005] NSWCCA 370.

²⁰⁴ *R v Gent* [2005] NSWCCA 370 at [99].

²⁰⁵ *R v Gent* [2005] NSWCCA 370 at [99].

²⁰⁶ [2007] NSWDC 83.

MAB was charged with eighteen offences including four offences of disseminating child pornography under s. 91H(2) *Crimes Act 1900* (NSW) and one offence of possessing child pornography under s. 91H(3) *Crimes Act 1900* (NSW). Of the eighteen offences, seven of the offences involved sexual assault, six of them involved the offender and a family friend (GEB) of the offender together or GEB alone performing sexual acts in front of the children, four of them involved the offender taking and sending photographs of the children in pornographic poses to GEB and three other males via the internet and one of them related to the offender's possession of child pornography sent to her by GEB via the internet.²⁰⁷ MAB pleaded guilty to the offences and offered to assist the police in prosecuting GEB and other men with whom she had 'chatted' with on the Internet.

The District Court sentenced the offender (for all of the 18 offences) to a total sentence of ten years with a total non-parole period of six years and six months and a parole period of three years and six months. When sentencing the child pornography offences under s.91H *Crimes Act 1900* (NSW), the court sentenced MAB to imprisonment for 9 months (which was initially reduced by 50% from two years to one year) for the four offences under s. 91H(2) *Crimes Act 1900* (NSW) and imprisonment for 9 months (which was initially reduced by 50% from two years to one year) for the one offence of possessing child pornography under s. 91H(3) *Crimes Act 1900* (NSW).²⁰⁸

When sentencing MAB, the court referred to the purposes of sentencing in section 3A *Crimes (Sentencing Procedure) Act 1999* (NSW) as well as the aggravating and mitigating factors in section 21A (1) *Crimes (Sentencing Procedure) Act 1999* (NSW). These sections state that when sentencing an offender, the Court is to take into account:

- the aggravating factors referred to in section 21A(2) *Crimes (Sentencing Procedure) Act 1999* (NSW);
- the mitigating factors in section 21A(3) *Crimes (Sentencing Procedure) Act 1999* (NSW); and
- any other objective or subjective factors that affects the relative seriousness of the offence.

Sections 21A (2) and (3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provide aggravating and mitigating factors for the Court to take into account and in MAB's case the Court considered the following:²⁰⁹

²⁰⁷ R v MAB [2007] NSWDC 83 at [28].

²⁰⁸ See also paragraph [45], where the Court discusses special factors influencing the reduction of the sentences. The Court also held at [46] that the offences under section 91H(2) *Crimes Act 1900* (NSW) should be served concurrently and consecutively upon the sentences for the offences under ss. 66A and 66C *Crimes Act 1900* (NSW). The offence under section 91H(3) *Crimes Act 1900* (NSW) was to be served consecutively upon the sentences under section 91H(2) *Crimes Act 1900* (NSW).

²⁰⁹ Aggravating factors in section 21A(2) include: the offender has a record of previous convictions; the offence was committed in company; the offence was committed in the home of the victim or any other person; the offence involved gratuitous cruelty; the injury,

Aggravating Factors ²¹⁰	Mitigating Factors ²¹¹
<ul style="list-style-type: none"> the emotional harm suffered by TB and KB was substantial; the offender abused her position as the mother of TB and KB; and TB and KB were vulnerable due to their relationship with the offender. 	<ul style="list-style-type: none"> the offences were not planned but were rather spur of the moment or opportunistic; the offender had an ‘unblemished character’; the offender was unlikely to re-offend; the offender had excellent prospects for rehabilitation; the offender had shown her remorse; the offender had pleaded guilty; and the offender had provided assistance in the investigation and prosecution of other offenders.

The District Court of NSW also made the following comments about the offender:

I fail to understand how the offender, the mother of TB and KB, the primary caregiver of them, the person to whom they were entitled to look for love and protection, the person in whom they trusted, could have so appallingly breached their trust and destroyed their love by involving them in sexual activities which debased and degraded them and then, to compound the enormity of her conduct, to send pornographic pictures of them via the internet to people who obtain sexual gratification from child pornography. The offender’s conduct demands condemnation and appropriately salutary punishment.²¹²

emotional harm, loss or damage caused by the offence was substantial and the offence was committed for financial gain. Section 21A(2) also states that ‘The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence’.

In *R v Pearson* [2005] NSWCCA 116, the offender was sentenced for an offence under section 91G(1) *Crimes Act 1900* (NSW) (using a child under 14 years for pornographic purposes).²⁰⁹ On appeal, the Court of Criminal Appeal held that the sentencing judge had erred by taking into account as a circumstance of aggravation a matter, which was an element of the offence, namely the victim’s age.

Mitigating factors in section 21A(3) include: the offender does not have any record (or any significant record) of previous convictions; the offender was a person of good character; the offender is unlikely to re-offend; the offender has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise; a plea of guilty by the offender and assistance by the offender to law enforcement authorities.

²¹⁰ Section 21A(2) *Crimes (Sentencing Procedure) Act 1999* (NSW).

²¹¹ Section 21A(3) *Crimes (Sentencing Procedure) Act 1999* (NSW).

²¹² [2007] NSWDC 83 at [29].

7.5 Possession of ‘deleted images’ of child pornography

Advances in computer technology have changed the way in which child pornography is disseminated and possessed. There have been a number of cases in Australia and the UK that have considered whether having ‘deleted’ images on a computer constitute possession of child pornography. The issue of whether knowledge of the existence of child pornography files on a computer is required to prove the offence of possession of child pornography arose in the recent NSW case of *R v Clark*.²¹³

R v Clark²¹⁴

Clark was charged with attempting to procure a child over the age of 14 years to be used for pornographic purposes, inciting the same person to commit an act of indecency towards him and possession of child pornography. The first two counts related to incidents when Clark invited the complainant to his house to be involved in child pornography videos. After a complaint to police, the police executed a search warrant and found two hard drives at Clark’s home with many images of boys of a pornographic nature (which were the subject of the third count).

The pornographic material comprised 22 files of images on one of the hard drives and 3,154 images in the temporary directory of another hard drive.²¹⁵ The record that had produced the images was held on a portion of the hard drives, which had been designated “deleted”. The evidence indicated that marking a file “deleted” did not remove it from the hard drive but changed its status so that it could be overwritten by the creation of another file.²¹⁶ If a file was deleted it could not be retrieved and displayed on the computer screen without a special program. There was no evidence to indicate that Clark knew how to retrieve the “deleted” files.

On appeal, the Court held that intention was required to prove the offence of possession of child pornography under section 91H(3) *Crimes Act 1900* (NSW). There was no evidence to prove intentional possession of any of the child pornography data or images because there was no evidence that indicated that Clark knew how to retrieve the ‘deleted files’ of child pornography. Accordingly, the conviction on the charge of possessing child pornography was quashed.

The appeal addressed the questions of whether the trial judge had misdirected himself regarding ‘possession’ and whether there was insufficient evidence to show that Clark had possessed child pornography. The NSW Court of Criminal Appeal cited *He Kaw The v R*²¹⁷ as follows:

²¹³ [2008] NSWCCA 122.

²¹⁴ [2008] NSWCCA 122.

²¹⁵ [2008] NSWCCA 122 at [214].

²¹⁶ [2008] NSWCCA 122 at [215].

²¹⁷ *He Kaw The v R* (1985) 157 CLR 523.

where a statute makes it an offence to have possession of goods, knowledge of the accused that those goods are in his custody, in the absence of a sufficient indication of a contrary intention, will be a necessary ingredient of the offence, because the word “possession” itself necessarily imports a mental element. The fact that the appellant was charged with having possessed data, rather than goods, makes no difference in principle.²¹⁸

Barr J, continued to say that:

In my opinion nothing in s91H or in s7 [*Crimes Act 1900* (NSW)] necessarily or by implication removes the requirement for the Crown to prove, when charging possession of some thing or some material, that the accused’s possession is intentional. No doubt some users of computers are highly expert in the art and realise that data which have been “deleted” may remain in whole or in part upon the hard drive and may by employing suitable means, be identified and retrieved. No doubt many other users of computers believe that the word “deleted” means what it says. Such persons, wishing to rid themselves forever of material on their computers, believe that by following the deletion procedure they have achieved exactly that end.²¹⁹

Accordingly, the NSW Court of Criminal Appeal stated that ‘although his Honour initially correctly directed himself that the Crown had to prove intentional possession, which in the present case involved proof that the appellant knew that the data were present and retrievable, those questions were never ultimately framed or answered.’²²⁰ There was no evidence that Clark knew that the deleted files were on the computer nor that he had the knowledge of computer programs that would enable him to retrieve the child pornography data. Accordingly, the Court of Criminal Appeal held that if Clark lacked the means to retrieve the images then he did not have the requisite intention to prove possession of child pornography under section 91H(3) *Crimes Act 1900* (NSW).

The NSW Court of Criminal Appeal also referred to a number of UK cases, which have dealt with similar issues of computer technology in relation to charges under section 160 *Criminal Justice Act 1988*. One example is the case of *R v Porter*, which related to still images and movie files with indecent photographs of children that had been placed into a ‘recycle bin’, which had then been emptied. Porter argued that he was not in possession of child pornography because he had placed the images in the recycle bin, which he had emptied. There was no evidence to indicate that Porter had the specialist software that was required to retrieve the deleted files. The trial judge held that Porter had possessed the files, whether they were in an “active” or “deleted” category. However, on appeal, the Court of Appeal held that possession refers to a defendant’s custody or control of images. Accordingly, if Porter could not retrieve the images and files then he no longer had custody

²¹⁸ [2008] NSWCCA 122 at [226].

²¹⁹ [2008] NSWCCA 122 at [227].

²²⁰ [2008] NSWCCA 122 at [247].

or control over them, even if they remained on his computer. As stated by Akdeniz, this case introduced a subjective element into the concept of possession of computer images.²²¹

Finally, in the UK case of *Atkins v DPP* the relevant files were held in a temporary 'cache'. In this case, a number of the photographs were downloaded and viewed from the Internet but they were deliberately 'not saved'. The expert evidence showed that a user could deliberately choose to download or save documents. However, the browser setting automatically created a temporary information store called a 'cache'. The magistrate had held that the offence was one of strict liability. However, on appeal the Court of Appeal considered whether knowledge of the existence of the cache was an essential ingredient of the offence of possession under section 160 *Criminal Justice Act* 1988. It held that a person is not guilty of an offence of possession if they do not know about the existence of a 'cache' of photographs on their computer.²²²

7.6 'Up-skirting' and the meaning of 'sexual context'

'Up-skirting' is another issue that has been addressed recently by the Court in NSW. In a recent article, Gillespie defines this type of behavior as taking a picture using a covert camera directed up a female's skirt.²²³ Gillespie explains that the advancement of technology, for example through the proliferation of mobile phone cameras has contributed to 'up-skirting' in recent years. In his article, Gillespie suggests that:

Technology has allowed deviant behavior to become more noticeable and arguably intensifies the number of people involved in the activity. There has been concern for many years that up-skirt pictures were being facilitated by the technological revolution, most notably through the proliferation of camera equipped mobile telephones and cheap digital cameras.²²⁴

There have been a number of cases in other jurisdictions which have dealt with this problem, for example the case of *Hamilton*²²⁵ in the UK where the offender was convicted under the *Protection of Children Act* 1978 for an offence which related an incident of 'up-skirting' in a supermarket. Further, as already mentioned in this paper, other countries such as New Zealand have introduced specific legislation to address 'up-skirting'.²²⁶ More recently, the issue of 'up-skirting' was addressed in the NSW case of *Drummond*, which

²²¹ *R v Porter* [2006] EWCA Crim 560. See also Yaman Akdeniz, 'Possession and Dispossession: a Critical Assessment of Defences in Cases of Possession of Indecent Photographs of Children, *Criminal Law Review*, April 2007, pp 281 – 284.

²²² *Atkins v Director of Public Prosecutions* [2002] 2 All E.R 425. See also Akdeniz, n. 221, pp 279 – 280.

²²³ Gillespie, n 69, p 370.

²²⁴ Gillespie, n 69, p 382.

²²⁵ [2007] EWCA Crim 2062.

²²⁶ Gillespie, n 69, p 378. See *Crimes (Intimate Covert Filming) Amendment Act* 2006.

involved a teacher who placed a camera in a bag so that he could film up the skirt of a schoolgirl at a shopping mall.²²⁷

DPP v Drummond²²⁸

Robert Drummond was a 42-year-old male who was charged with offences under sections 61N(1) *Crimes Act 1900* (NSW) for committing an act of indecency towards a person under the age of 16 years; 61N(2) *Crimes Act 1900* (NSW) for committing an act of indecency towards a person over 16 years; 91H(2) *Crimes Act 1900* (NSW) for producing child pornography; and 91H(3) *Crimes Act 1900* (NSW) for possessing child pornography.

The ‘up-skirting’ incident occurred at a queue at Priceline at Warringah Mall, when a 14-year-old girl noticed that Drummond had placed a bag next to her right foot with a video camera inside pointing up her skirt. When the police searched the offender’s home, the police found a video of the female in school uniform and images showing her legs, thighs and underpants covering her buttocks and genital area. They also found a DVD, taken of a girl in a library, where the ‘camera appears to be very close to her and is aimed primarily at her buttocks area’.²²⁹ Drummond was convicted by the Local Court and sentenced to four months imprisonment. However, the Court suspended the sentence immediately on Drummond undertaking a good behavior bond.²³⁰

It appears from *Drummond* that ‘up-skirting’ may be addressed by sections 91H(2) and 91H(3) *Crimes Act 1900* (NSW). In *Drummond*, the Crown was required to show that the images in the video constituted child pornography, as defined by section 91H(1) the *Crimes Act 1900* (NSW), namely that:

- the video depicted the victim under (or apparently under) the age of 16;
- the video depicted her in a sexual context;
- in a manner that would in all circumstances cause offence to reasonable persons.²³¹

In *Drummond*, there was no dispute that the girl who was filmed was under 16 years old because her birth certificate was tendered in evidence.²³² However, the accused argued that that the video did not depict the girl in a ‘sexual context’. When considering the meaning of ‘sexual context’, Magistrate Huber stated:

²²⁷ *DPP v Drummond* [2008] NSWLC 10. See also Kelley Burnton, ‘Voyage forward for Queensland: Unauthorised taking of photographs and making of film and its subsequent publication on the Internet’, (2005) at <http://eprints.qut.edu.au/archive/00004179/01/4179.pdf>

²²⁸ *DPP v Drummond* [2008] NSWLC 10.

²²⁹ *DPP v Drummond* [2008] NSWLC 10 at [14].

²³⁰ ‘Robert Ian Drummond walks free, good behavior bond’, *The Daily Telegraph*, July 28, 2008; Bruce Malcolm, ‘Porn teacher out on bond’, *The Daily Telegraph*, 29 July 2008.

²³¹ *DPP v Drummond* [2008] NSWLC 10 at [44].

²³² *DPP v Drummond* [2008] NSWLC 10 at [46].

The video must be viewed in its entirety. It is obvious that the footage is taken via a concealed camera and is filmed up a female's skirt. The material clearly depicts the legs, thighs, buttock, crotch area and underwear of a female in circumstances where she is unaware of being photographed until the last moment.²³³

The material was also required in all the circumstances, to cause offence to a reasonable person. In response to the argument by the defendant that the video would not cause offence to reasonable persons, Magistrate Huber made the following comments:

The Act requires that the "material ... in all the circumstances cause offence to reasonable persons". "All the circumstances" include how and why the material came into existence. That is: taken via a concealed camera; up a schoolgirl's uniform; to be viewed at a later time in order to assist in sexual gratification whilst masturbating...It would be a sorry indictment on our community if the Court did not find that this would cause offence to reasonable persons.²³⁴

7.7 Fictional persons

Holland v R²³⁵

On 16 October 2003, Holland was convicted in the District Court of two charges under the *Customs Act 1901* (Cth)²³⁶ for knowingly importing Tier 2 goods, namely a book titled 'Street Boy Dreams' and recklessly importing Tier 2 goods, namely a book titled 'Koinos 26 - 2nd Quarter' contrary to s.233BAB (5) *Customs Act 1901* (Cth). On 27 April 2000, Holland departed from Perth to go overseas. Whilst overseas he went to Amsterdam in the Netherlands where he posted two envelopes to himself, which were intercepted by Customs officers. One envelope contained three books, including the book 'Street Boy Dreams' which was a work of fiction about a teacher and his relationship with a 14-year-old boy. The other envelope contained the book or magazine 'Koinos 26 - 2nd Quarter 2000'. Holland gave evidence that he had posted the materials to Australia by mistake. The District Court of Western Australia fined Holland \$1000 for knowingly importing goods, which were Tier 2 goods (the book titled 'Street Boy Dreams') and \$500 for recklessly importing goods, which were Tier 2 goods (the book titled 'Koinos 26 2nd Quarter 2000').

On appeal, the appellant raised a question of whether the word 'person' in the context of the *Customs Act 1901* (Cth) meant a real person or fictitious person.²³⁷ When considering whether 'person' referred to a fictional or real person, the Western Australian Court of

²³³ *DPP v Drummond* [2008] NSWLC 10 at [52].

²³⁴ *DPP v Drummond* [2008] NSWLC 10 at [54 - 55].

²³⁵ [2005] WASCA 140.

²³⁶ This case was heard prior to the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth).

²³⁷ [2005] WASCA 140 at [23].

Appeal cited *R v Assheton*²³⁸ and the Canadian case of *R v Sharpe*.²³⁹ In the latter case, the Supreme Court of Canada considered whether a person applied to an actual or imaginary person in the context of the Canadian legislation:

The ... issue is important because it governs whether the prohibition on possession is confined to representations of actual persons, or whether it extends to drawings from the imagination, cartoons, or computer generated composites. The available evidence suggests that explicit sexual materials can be harmful whether or not they depict actual children. Moreover, with the quality of contemporary technology, it can be very difficult to distinguish a 'real' person from a computer creation or composite. Interpreting 'person' in accordance with Parliament's purpose of criminalizing possession of material that poses a reasoned risk of harm to children, it seems that it should include visual works of the imagination as well as depictions of actual people.²⁴⁰

Accordingly, the Western Australian Court of Appeal held that the word "person" includes the description or depiction of imaginary or fictional characters.²⁴¹ The Court also clarified that written material as well as images could be considered to be depictions and stated:

The underlying purposes were both to shield the community from injury and protect children from exploitation. It would be inconsistent with the legislative purpose, and create an unnecessary anomaly, were the section to be construed to allow proscription of pictorial publications of serious child pornography as tier 2 goods but not allow such proscription of descriptive texts of serious child pornography.²⁴²

The Western Australian Court of Criminal Appeal considered a similar theme in *Dodge v The Queen*²⁴³, where the offender was sentenced for supplying child pornography to another offender and possessing child pornography in the form of fictional written material.²⁴⁴ Dodge was sentenced to 18 months imprisonment for each offence, to be served cumulatively. An argument that was put before the Court was that 'being in possession of fictitious material where there were no victims was materially different to offending against individuals who have feelings and suffer consequences' and that Dodge had rewritten the stories to make them legible (rather than producing them).²⁴⁵ On appeal, the Western Australian Court of Criminal Appeal cited *R v Liddington*, which stated that:

²³⁸ (2002) 132 A Crim R 237.

²³⁹ [2001] 1 SCR 45.

²⁴⁰ [2001] 1 SCR 45 at [38 –39] cited in *Holland v R* [2005] WASCA 140 at [201].

²⁴¹ *Holland v The Queen* [2005] WASCA 140 at [203].

²⁴² *Holland v The Queen* [2005] WASCA 140 at [189].

²⁴³ (2002) WASCA 286.

²⁴⁴ The offences were under the previous section 60 *Censorship Act 1996* (WA).

²⁴⁵ *Dodge v R* (2002) WASCA 286 at [13].

The mere fact that persons are prepared to possess child pornography, albeit for their private purposes, necessarily creates a market for the corruption and exploitation of children. Children are abused, violated and degraded in order to create a market of this kind. It may also be said that people with pederastic inclinations could be stimulated to commit pederastic acts on viewing these images.²⁴⁶

The Western Australian Court of Criminal Appeal held that the written material still constituted child pornography but commented that Dodge had retained 17 items of writing for seven years before supplying it to someone else, which was a different type of offence to one which involved the downloading and supplying of photographic images.²⁴⁷ Accordingly, taking into account that there were no real children involved in the production of the written material, no financial gain to Dodge, a relatively low number of items involved, a plea of guilty, co-operation by the offender as well as the amount of time that the offender had already been in prison, the Court reduced his sentence on appeal from 3 years to 12 months imprisonment for each offence (to be served concurrently).²⁴⁸

7.8 Honest mistake as to age

R v Clarke²⁴⁹

Rebecca Jane Clarke was convicted of offences of producing child pornography under section 63(a) of the *Criminal Law Consolidation Act 1935* (SA) and inciting a child to commit an indecent act under section 63B(1)(a) of the *Criminal Law Consolidation Act 1935* (SA). Clarke and two others filmed two 14-year-old girls engaged in acts of indecency. The co-accused pleaded guilty and admitted that they were aware that the girls were under 17 years of age. Clarke acknowledged that the film had been produced and that she was aware of its pornographic nature. However, Clarke's defence was that she honestly and reasonably believed that the two girls were 17 years old. At the trial in the District Court, the Judge took the view that an honest and reasonable mistake of fact was not a defence and considered the offences to be offences of absolute liability. The District Court sentenced Clarke to one term of imprisonment of 12 months with a non-parole period of eight months. The Court of Criminal Appeal allowed the appeal and ordered that the appellant enter into a two-year good behavior bond. The South Australian Court of Criminal Appeal agreed that the honest and reasonable belief did not constitute a defence. However, the Court did consider it to be a significant mitigating factor when sentencing

²⁴⁶ (1997) 18 WAR 394 cited in *Dodge v R* (2002) WASCA 286 at [19].

²⁴⁷ For example, *R v Coultas* [2002] WASCA 131, which involved 94 counts of supply as well as one charge of possession (covering thousands of photographs). In *R v Jones* (1999) 108 A Crim R 50, the offences involved 80,000 images.

²⁴⁸ *Dodge v The Queen* (2002) WASCA 286.

²⁴⁹ [2008] SASC 173.

Clarke.²⁵⁰ The South Australian Court of Criminal Appeal also took into account that Clarke had no prior record, was aged 21 years old at the time of the offence, was influenced by alcohol and that there was no risk of further re-offending.²⁵¹

Accordingly, Clarke's case held that honest and reasonable mistake as to age of the victims is not a defence, but was a relevant mitigating factor in sentencing. The Court of Criminal Appeal stated:

It was appropriate for the appellant to be sentenced on the basis that if the facts were as she believed them to be, no offence would have been committed. In other words, while her honest and reasonable mistake of fact may not have been relevant in the determination of her guilt of the offences, it was relevant to the determination of her sentence. That did not mean (as the submissions of the appellant's counsel implied) that she could be sentenced as though no offence, or no serious offence, had been committed at all.²⁵²

The Court continued to say:

Members of the community must be aware that the offences in question are to be viewed seriously. Those who are minded to produce, possess or disseminate child pornography must know that it can be punished severely. In this way, children are to be protected from the exploitation, degradation and humiliation which child pornography involves. The sentences imposed upon defendants who participate in the production of child pornography, even when doing so under an honest and reasonable mistake, should operate to warn all members of the community of the need for vigilance in this area. Those minded to engage in the production of pornography, especially involving young people, must appreciate the need to *ensure* that they do not involve children.²⁵³

In *R v Gelding*²⁵⁴, the South Australian Court also held that the defence of honest and reasonable mistake as to the child's age is not an available defence to an offence under section 63B(3)(a) of the *Criminal Law Consolidation Act 1935* (SA)²⁵⁵. The Court held that the prosecution was not required to prove that the defendant knew that the recipient of a communication with intent to procure a child to engage in sexual activity was a 'child', or did not have an honest and reasonable belief to the contrary.

²⁵⁰ [2008] SASC 173 at [16].

²⁵¹ [2008] SASC 173 at [19].

²⁵² [2008] SASC 173 at [29].

²⁵³ [2008] SASC 173 at [31].

²⁵⁴ (2007) SADC 124.

²⁵⁵ The relevant offence is making a communication with intent to procure a child to engage in, or submit to sexual activity.

7.9 Conducting academic research

According to s. 91H(4)(c) of the *Crimes Act 1900* (NSW), it is a defence if the child pornography material was used, or intended to be used for genuine research purposes. There have been a number of cases in the UK where defendants have claimed that they had a legitimate reason to have possession of child pornography as part of their academic research. One example is *Atkins v Director of Public Prosecutions*.²⁵⁶ In this case, Dr Atkins argued that he was conducting academic research, which was a defence under the relevant UK legislation. However, the Court held that Dr Atkins was not conducting ‘honest and straightforward research into child pornography’. The key question the Court asked was ‘whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research’, which will depend on the facts of each individual case. Another example is the case of *Wrigley*, where the Court held that the defendant was not conducting legitimate academic research. A relevant factor was that he had not discussed his academic program with his tutors.²⁵⁷

²⁵⁶ (2006) EWCA Crim 560, Akdeniz, n 221, p 278.

²⁵⁷ CA, Case No.99/01497/Z5, May 26, 2000. Akdeniz, n 221, p 279.

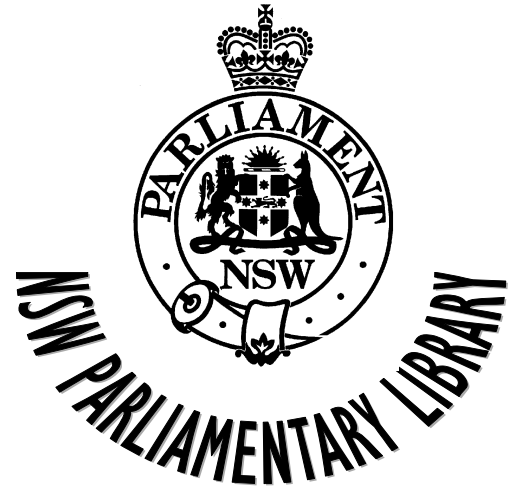
8 CONCLUSION

That child pornography offences constitute heinous crimes is beyond dispute, as is the fact that the opportunity for committing such offences has increased in the modern age, in particular with the advent of the Internet. It would seem that some, perhaps many offenders, have assumed that this is an anonymous form of communication where their identities are shielded from police investigation. Successful police operations over the past few years have given the lie to this assumption, which may deter some potential offenders.

Be that as it may, the availability of child pornography on the Internet has certainly increased the rate of offending, at least as far as possession is concerned. It has also raised community concern about the prevalence of child pornography crimes, resulting in increases in recent years in maximum penalties for these offences across all Australian jurisdictions. The fact that the NSW Sentencing Council is currently conducting a review of those penalties, in conjunction with penalties for other sexual offences indicates that further amendment may be imminent in this State.

As in many other areas of the law, the question can be asked whether the relevant penalties for comparable offences in this area should be consistent across all Australian jurisdictions. A major difference between the offences in the Commonwealth, on one side, and in the States and Territories, on the other, is that the Commonwealth Criminal Code deals only with telecommunications offences, whereas the reach of the other jurisdictions is much broader. The Commonwealth Customs Act does cover child pornography material in hard copy form, but only where this is imported into or exported from Australia. A further consideration is that judicial regard for comity between jurisdictions tends to generate significant cross-referencing between Australian jurisdictions. What may seem like a patchwork quilt of offences on paper can in practice be relatively coherent in terms of approaches and outcomes.

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